United States Court of Appeals
for the Second Circuit

APPENDIX

76-7510

United States Court of Appeals

FOR THE SECOND CIRCUIT

ELGIE & COMPANY,
Plaintiff-Appellant,
(Docket No. 76-7510)

—against—

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,
Defendant-Appellee and Third-Party Plaintiff-Appellant, (Docket No. 76-7562)

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant-Appellee

UNITED STATES COURT OF APPEALS
FILED
JAN 14 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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P/S

JOINT APPENDIX

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Docket Entries

ATE	PROCEEDINGS	Date Ord Judgment
21-74	Filed Complaint & Issued Summons	
26-74	Filed summons & return, served the following defts. South African Marine Corp. 11-22-74,	
5-75	PRE-TRIAL CONFERENCE HELD BY Goettel	
2-75	Filed deft. South African Marine Corp. Ltd. answer to complaint	
12-75	Filed Third Party Complaintby deft and third party pltff South African Marine Corp. Ltd. complaining of Third Party Deft as indicated.	
12-75	Filed defts Notice to take deposition of pltff on 6-18-75.	
24-75	Filed ANSWER of third party deft. to complaint & third party complaint & counterclaim	
23-85	Filed summons & marshalls return, served;International Terminal Operating Co. on 6-13	
27-75	Filed Notice that deft. and third party pltffs will take deposition of its President etc, as indicated on 7-16-75.	
27-75	Filed Reply of deft and Third Party Pltffs to third party deft counterclaim against third party pltff.	
14-75	PRE-TRIAL CONFERENCE HELD BY Goettel	
8-75	Filed deft Intl Terminal Operating Co. Inc. Request for production of documents.	
-8-75	Filed Requests of third party deft Intl Terminal Op. Co. Inc. that deft. South African Marine Corp. Ltd produce documents etc. as iddicated.	
-9-75	PRE-TRIAL CONFERENCE HELD BY Goettel	
-75	Filed defts answers to interrogatories.	
-20-75	Filed interrogatories of deft and third party pltff.	
-28-75	Filed pltffs Answers to interrogatories of deft and third party pltff.	
-7-75	Filed stip & order that the time of third party defts Notice to deft etc, is extended to 11-14-75. Owen, J.	
-11-75	Filed stip & order that the third partys notice to deft etc, is extended to 12-11-75. Owen, J.	
-1-75	PRE-TRIAL CONFERENCE HELD BY MAG GOETTEL	
2-08-75	Filed 3rd Pty Deft's. request for admission of facts & genuiness of documents.	
2-10-75	Filed Pltff's. answers to 3rd Pty Deft's. notice to admit.	
2-15-75	Filed Stip & Order extending 3rd Pty Deft's. notice to produce to Deft. & 3rd Pty Pltff. to 1-8-76........Owen,J.	
1-08-76	Filed Deft's. (South African) answer to 3rd Pty Deft's. notice to admit.	
1-12-76	Filed Pltff's. notice of taking deposition of Mr. Shambo on 1-23-76.	
2-04-76	PRE-TRIAL CONFERENCE HELD BY: Mag. Goettel.	
-05-76	Filed Stip & Order referring this matter to Mag. Goettel for trial......Owen,J.	
-23-76	PRE-TRIAL CONFERENCE HELD BY: Mag. Goettel.	
3-19-76	PRE-TRIAL CONFERENCE HELD BY: Mag. Goettel.	
23-76	Filed notice of reassignemnt to J. Goettel. m/n	
-10-76	Filed post trial memorandum of law on behalf of deft. and 3rd-party pltf. South African Marine Corp., Ltd.	
-15-76	Filed deft.-3rd pty pltf's reply post trial memorandum of law.	
-09-76	Filed OPINION #[illegible]069 that in conclusion, therefore, the pltf. is entitled to recovery against the deft. but its recovery, pursuant to the contract of carriage, is limited to $500. The deft is not entitled to indemnity or attorney's fees from the third-party deft. Judgment shall be entered accordingly.---Goettel, J. m/n	J
09-13-76	Filed 3rd-pty deft s proposed findings pf fact	
-13-76	Filed 3rd-pty proposed conclusions of law	
-13-76	Filed deft. 3rd-pty pltf.'s proposed findings of fact and conclusions of law	
-12-76	Filed FINAL JUDGMENT # 76.911 that pltf. have judgment against defts in the amount pf $500.00. and that deft South Afircan Marine Corp. Ltd's claim for indemnity against the third pty deft. is barred—Goettel, J. Judgment entered 10-13-76—Clerk	
3-19-76	Non-Jury trial begun & concluded. D.R. — Goettel, J.	

STEWART, J.

74 CIV. 5112
ELGIE & COMPANY
VS
S.S. "S.A. NEDERBURG" her engined etc.

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
10-12-76	Filed pltf. notice of appeal to the U.S.C.A for the Second Circuit fron final judgment entered on 10-13-76. Mailed copy toMessrs. Haight Gardner Poor & Havens and Bigham Englar Jones & Houston.
11-01-76	Filed notice of original record on appeal has been certified and transmitted to the U.S..C.A. for the Second Circuit on 11-1-76.
11-01-76	Filed transcript of record of proceedings dated 3-23-76
11-01-76	Filed Transcript of record of proceedings dated 3-19-76
11-08-76	Filed deft. and 3rd-pty pltf. notice of appeal to the U.S.C.A for the Second Circuit fron the Opinion filed on 9-9-76 and final judgment entered on 10-13-76 mailed copies to Bigham, Englar, Jones & Houston and Hill, Rivikins Carey, Loesberg & O'Brien.

J 3a

U.S. DISTRICT COURT
FILED
SEP 09 1976
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELGIE & COMPANY,

Plaintiff,

-against-

S. S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant and Third-Party Plaintiffs,

-against-

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

Third-Party Defendant.

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74 Civ. 5112 (GLC)

OPINION[1]

#45069

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GOETTEL, D. J.

This is another episode in the continuing saga of the package limitation clause in ocean carriers' bills of lading: "no stranger to this court." *Toyomenka, Inc. v. S.S. Tosaharu Maru*, 523 F.2d 518, 519 (2d Cir. 1975). It is of that particular genus involving erroneous bills of lading and, as such, further explores the ramifications of *Miles Metal Corporation v. M.S. Havjo*, 494 F.2d 563 (2d Cir. 1974).

The plaintiff, Elgie & Company, purchased from Shuron Continental, in 1973, an optical grinding machine referred to as a generator (since it generates opthalmic curves on lenses), along with certain additional parts and machinery. The goods were packed in Tampa, Florida for shipment to South Africa. The generator was packed in a large crate and the parts were packed in smaller containers or cartons. The goods were sold pursuant to invoice against an irrevocable letter of credit which called for the draft to be accompanied by an "on board" shipping company bill of lading marked "freight prepaid." The generator itself, exclusive of parts, was invoiced at $8,670. Including freight and insurance, its value came to $10,559.47.

The answer admits that the defendant, South African Marine Corporation, Ltd., is a foreign corporation engaged in international shipping and that the case is, therefore, governed by the Carriage of Goods By Sea Act ("COGSA"), 46 U.S.C. §1300 _et seq_. The defendant ship line admits receipt of the goods in question, the issuance of a bill of lading covering all of the goods denoted therein, and that at least one piece of the freight listed was apparently not loaded aboard the S.A. Nederburg (as indicated in the bill of lading) nor dedelivered to plaintiff.

The seller's freight forwarder testified to the delivery of the goods from Tampa to the New York pier and the obtaining of a dock receipt from the defendant. The invoice, dock receipt and the bill of lading establish that the crate was supposed to contain the generator purchased by plaintiff. The crate and the smaller cartons were not opened at any time en route, but they were weighed and they conformed to the original shipment in weight and volume. (The goods arrived in New York on December 12, 1973, but were not forwarded to the pier until March 13, 1974.)

The goods were originally listed for shipment aboard the S.A. Morgenster, another vessel owned by the defendant ship line. The terminal to which the goods were delivered is operated by the third-party defendant, International Terminal Operating Company, Inc., ("ITO"), who are also the stevedores. They issued the dock receipt and had custody of the goods until they were to be loaded aboard the defendant's vessel. While there was considerable confusion in the testimony, a reasonable conclusion to be drawn from it was that both the large crate and the smaller eleven cartons were moved out by the stevedores to be loaded aboard the Morgenster. The Morgenster, however, was overbooked. Some cargo was intentionally shut out, but it does not appear that any of the plaintiff's cargo was intentionally shut out. The records indicate that the one large crate was probably loaded on the Morgenster.[2/]

A day or two after the Morgenster sailed the stevedores discovered a number of plaintiff's cartons, intended for the Morgenster, still on the pier. They, therefore, changed the papers to indicate that all of the cargo would go forward on defendant's next vessel, the S.A. Nederburg, which was then commencing loading.[3/] Tally sheets and other records make it fairly clear that only the eleven cartons were actually loaded aboard the Nederburg.

There was a sharp conflict in the testimony between the defendant shipper and the third-party defendant stevedore concerning the handling of cargo under circumstances such as outlined above, resulting partly from the fact that the procedures were changed about this time. The ship line maintains that the stevedores notified it, by sending them a copy of the dock receipt which indicated that none of plaintiff's cargo had been loaded aboard the Morgenster, that all of the cargo would be placed aboard the Nederburg. The stevedores, on the other hand, contend that the system of sending copies of dock receipts for left behind cargo had been abandoned and that an actual list of remaining cargo was made so that it was the shipper's responsibility to know what had been left on the pier. The stevedores do acknowledge that previously there had been a duty to call to the attention of the ship line any "split shipments," which is apparently what occurred here.

On April 29, 1974, the Nederburg arrived in Durban, South Africa, and discharged its cargo, at which time only the eleven cartons could be located for delivery to the consignee -- the plaintiff, Elgie & Company. The missing crate containing the generator was never located.

The defendant, South African Marine, had issued an on-board bill of lading for all eleven cartons and the crate which was marked "Received on board March 22, 1974." The bill of lading was endorsed and presented to a bank along with other pertinent documents and payment was made to the seller, Shuron Continental. The issued short-form bill of lading incorporated all the terms and conditions of the carrier's regular long-form bill of lading. The long form extended the application of COGSA to the entire time that the goods were within the possession and responsibility of the carrier.[4] (This was not, therefore, the common "hook-to-hook" bill of lading in effect from the commencement of loading to unloading.) The dock receipt, which originally called for the shipment of goods aboard the Morgenster, was later changed to indicate that the shipping vessel would be the Nederburg. It was not established when this change was made, by whom, or under what circumstances.

The contract between the defendant ship line and the stevedore called for the latter to furnish terminal and stevedoring services for South African Marine's vessels. This included the receiving and checking of all cargo destined for the vessels. The plaintiff's goods were in the stevedore's possession from March 13, 1974 until loaded aboard the defendant's vessels. Although the bill of lading indicated that all twelve pieces of cargo had been loaded on board the Nederburg on March 22, 1974, the stevedore's records reveal that only eleven cartons were loaded and this over a three-day period commencing on that date.[5] The dock receipt which had been issued by the stevedore when the shipment in question was delivered also incorporates the terms and provisions of South African Marine's long-form bill of lading, which, in turn, extends the limitations of liability of the ship line to its servants and agents.[6]

Before turning to the major issue of the applicability of the package limitation clause, two threshold issues are raised by the defendant and third-party defendant. Initially they contend that the plaintiff is not the real party in interest. That is a recurring claim in these cargo damage cases. It appears, however, to have no basis here. The generator's price included the payment of the freight charge. The plaintiff was required to make payment upon the delivery of a clean on-board bill of lading, which it did. The Uniform Commercial Code, §2-320, makes it clear that title passed from the seller to the plaintiff-buyer upon the delivery of the goods to the ship line and the issuance of a bill of lading and the other required documents. Thereafter, the risk of loss was upon the purchaser. The evidence made it clear that the risk here was borne by the plaintiff, who had to pay the seller for the shipment of the replacement generator.

Next the defendants contend that the plaintiff did not establish the value of the contents of the undelivered crate since it had no direct evidence that it did in fact contain the generator. A bailor makes out a prima facie case merely by showing delivery of the goods to the bailee (here the shipper) and failure to return at the required time. Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 812 (2d Cir. 1971); Miles Metal Corporation v. M.S. Havjo, 494 F.2d 563, 564 (2d Cir. 1974). The plaintiff offered its proof of value through a representative of the selling company who testified, on the basis of his company's records, that the crate contained the generator (nothing else was ever shipped in crates), and the size and description of the crate tallied with the dock receipt issued when the cargo was received by the steamship companies. The value of the generator was established both from the company's records and also from the amount which had to be paid for the shipment of the replacement generator.

It is true, as argued by the defendants, that plaintiff was unable to produce a witness who could testify to the actual packing of the generator in the crate. This is not surprising. Indeed, it would be an unusual case where a witness could be found some years later who could remember the specific packing of one of many items shipped daily by a manufacturing company. That it could not trace the generator itself (as contrasted to the crate it was packed in) through all the various hands it passed does not defeat its claim.

No evidence was offered disputing plaintiff's claim that the missing crate contained the generator. If damage be established in fact, although uncertain in exact amount, recovery for damages is not precluded. Palmer v. Connecticut Ry. Co., 311 U.S. 544, 561 (1941). As the Supreme Court said in Story Parchment Co. v. Paterson Co., 282 U.S. 555, 562 (1931):

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of the damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner has sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

The cases cited by the defendants are not in opposition. They all concern goods which arrived in damaged conditions, or partially short, where the burden remained on plaintiffs to prove the fact that the damages or the shortages occurred while the goods were in the defendants' possession. For example, George F. Pettinos, Inc. v. American Export Lines, 68 F.Supp. 759 (E.D. Pa. 1946), aff'd, 159 F.2d 247 (3d Cir. 1947) involved a damaged and short delivery of graphite; Royston Distributors, Inc. v. Moore-McCormack Lines, Inc., 252 F.Supp. 480 (E.D. Pa. 1965), involved uncrated damaged cars; and Commodity Service Corporation v. Hamburg-American Line, 354 F.2d 234 (2d Cir. 1965), concerned the spoilage of some of plaintiff's pork products.

The type of proof necessary in those cases differs completely from that necessary to establish value in a non-delivery case. It is undisputed that the plaintiff paid $9,537 for the replacement generator along with additional ocean freight, inland freight and insurance, as well as freight forwarder's charges, for total damages of $10,559.47.

It would be both unrealistic and impractical to expect plaintiff to be able to establish the value of the goods at all points in transit, particularly when the loss occurred within the possession of the defendants.

So the threshold issues raised by the defendants are resolved in favor of the plaintiff; i.e., the plaintiff is a real party in interest and the plaintiff has adequately proved its damages.

This bring us then to a consideration of the package limitation issue. It is perhaps worthwhile to review some of the Second Circuit's decisions during the past few years on that subject. In Leather's Best, Inc. v. S.S. Mormaclynx, supra, the loss occurred after cargo was discharged from the vessel and while in the custody of the vessel owner's subsidiary operating a terminal area. (The goods were stolen from the pier after unloading.) The major issue was whether, where ninety-nine bales of leather were placed in a single metal container and then sealed, the vessel's liability should be only $500 for the entire container, as prescribed by the bill of lading, or $500 per bale. The court found the "package" to be each of the ninety-nine bales and held that a limitation of $500 per container set forth in the bill of lading was invalid under COGSA. The court noted, however, that once the container had been unloaded, COGSA and its package limitation no longer applied. However, the court found it inequitable to allow the previously invalid limitation to become revitalized. (Judge Mulligan dissented on this point.)

The terminal operator was not a party to the contract of carriage. It was merely an agent of the shipping line acting within the scope of its authority and, as such, was not liable ex contractu for a breach of the contract between its disclosed principal and the plaintiff. While plaintiff might assert a claim in negligence against the stevedore, it would not be within Federal admiralty jurisdiction. The court did note, in passing, that under New York's law of bailments an agent acting within the scope of his authority is entitled to the benefit of any contractual limits upon the liability of his principal.

In Miles Metal Corporation v. M.S. Havjo, supra, the ship owner issued a bill of lading although there was no evidence that the cargo had ever been on board the vessel prior to its departure, nor any indication of delivery to another port. The question then was whether the bill of lading's limitation of liability had any effect. The court refused to treat the bill of lading as prima facie evidence of actual loading and viewed it merely as evidence of receipt of the goods by the shipping line. The court noted that:

> "Were the on board bill of lading to be accorded the evidentiary weight that the defendant here claims for it, negligent, if not fraudulent behavior, on the part of carriers would be encouraged. By simply stamping the bill of lading 'on board,' even before the goods had been loaded, the carrier could effectively extend the $500 liability limitation for cargo already on board a ship, 46 U.S.C. §1304(5), to goods in its possession at dockside." (at 565)

Finally, in Toyomenka, Inc. v. S.S. Tosahura Maru, supra, the court considered the question of the stevedore's negligence causing damage and whether it was entitled to the benefit of a limitation on the carrier's liability provided for in the bills of lading. Noting that each case turns on the provisions of the particular bill of lading, the court gave a rather restrictive interpretation to the bill of lading before it:

> "In construing the limitation of liability provision of the bills of lading now before us, as we have done many times before, it is important to bear in mind that we are dealing in a field where recognition of technical precision of language has been the benchmark of our decisions and those of the Supreme Court. Moreover, it must be remembered that the effect of this limitation of liability clause is greatly to reduce the liability of the beneficiary of the clause despite that party's negligence as against a shipper whose goods have been lost or damaged through no fault of his own. In short, in applying strict rules of construction, we do so without blinding ourselves to the equities.
>
> "It is axiomatic that parties to a bill of lading may extend the $500 limitation of liability to third parties. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 302 (1959); Cabot Corp. v. S.S. Mormacscan, 441 F.2d 476, 478-79 (2 Cir.), cert. denied,

> 404 U.S. 855 (1971). Such a limitation of common law liability, however, must be clearly expressed. A bill of lading containing such a limitation will be strictly construed against the parties whom it is claimed to benefit. * * * And we have refused to extend such limitation of liability where the bill of lading is ambiguous as to the parties covered. Rupp v. International Terminal Operating Co., 479 F.2d 674, 676-77 (2 Cir. 1973); Cabot Corp. v. S.S. Mormacscan, supra, 441 F.2d at 478.
>
> "Applying these well established principles, we hold that the bills of lading in the instant case lack the clarity and precision required to permit an extension of limitation of liability to McRoberts." (at 520-521)

The court, however, did not prohibit the inclusion of such provisions in bills of lading as it commented in its final footnote (Id., 552, n.8):

> "Nothing in this decision is intended to preclude parties to a bill of lading from further refining the contract language so as to provide with clarity and precision their intention to extend the limitation of liability to specified third parties. In short, we believe that the problem with which we have dealt in this case can be

> easily averted in the future by the careful draftsmanship for which the admiralty bar is noted."

See also:

Bernard Screen Printing Corporation v. Meyer Line, 328 F. Supp. 288 (S.D.N.Y. 1971), aff'd, 464 F.2d 934 (2d Cir. 1972), cert. denied, 410 U.S. 910 (973); United States v. The South Star, 115 F.Supp. 102 (S.D.N.Y. 1953), aff'd, 210 F.2d 44 (2d Cir. 1954).

It is apparent that the shipper in this case has attempted to effectively expand the package limitation to cover "the entire time the goods are in the custody of the carrier." Both the issued bill of lading and the dock receipt incorporate the terms of the long-form bill of lading so expanding the package limitation.

Incorporation of such terms in a short-form bill of lading has been held proper in this circuit. Encyclopedia Brittanica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7 (2d Cir. 1969), cert. denied, 397 U.S. 964 (1970). The incorporation of the terms of the bill of lading in the dock receipt has also been accepted. *Eastman Kodak Co. v. S.S. Transmariner*, Docket No. 71 Civ. 304 S.D.N.Y. Nov. 1, 1974, 1975 A.M.C. 123. The purchaser of the subject shipment is also bound by these terms. *Encyclopedia Brittanica, Inc. v. S.S. Hong Kong Producer*, *supra*; *Givaudan Delawanna v. The Blijdendijk*, 91 F.Supp. 663 (S.D.N.Y. 1950). Such extensions of limitation are permitted by the Carriage of Goods By Sea Act, 46 U.S.C. §1307.

Even if the bill of lading is void and ineffective with respect to the crate, the dock receipt would produce the same result of limiting the plaintiff's recovery to $500. This is so because the contract extended the package limitation to cover all periods during which the goods were in custody of the shipper.

Although the evidence was far from conclusive, it would appear that the crate in question was in fact loaded and shipped aboard the S.S. Morgenster on March 15, 1974, as originally intended by the seller's freight forwarder.[7/] The carrier's long-form bill of lading allows it to ship a piece on any vessel -- there was no requirement that the shipment be made aboard a specific vessel.

The final argument of the plaintiff is that the limitation cannot be applied here because there was fraud or negligence on the part of the shipper which invalidates the bill of lading and negates the effectiveness of the package limitation. Plaintiff relies primarily on the *Havjo* case, but it stands simply for the proposition that a shipper cannot gain the benefit of the package limitation merely by issuing a bill of lading claiming that the goods were on board when, in fact, they were not. While there was undoubtedly negligence on the part of either the shipper or the stevedore (a point to be considered subsequently), there clearly was no fraud. The bill of lading was simply an error and nothing more.

The plaintiff argues, in effect, that the shipper should be estopped from asserting the limitations defense because of its error in issuing an incorrect bill of lading. If the plaintiff's argument were accepted, it would be necessary in every non-delivery case for the shipper to prove that the goods were in fact loaded as per the bill of lading. With the rare exception of goods lost at sea, in non-delivery cases the ultimate disposition of the goods is usually unknown. To nullify the package limitation because the bill of lading may have been erroneous would be to completely change the burden of proof and the relationships between the parties. The Havjo case does not require such a result. As this court said in Eastman Kodak v. Transmariner, 1975 A.M.C. 123, 126 (S.D.N.Y. 1974):

> "There [Havjo] the Court was concerned with and ruled upon an unrelated issue the evidentiary weight to be given an on-board bill of lading offered as the sole proof that the cargo had in fact been placed on board the vessel. Necessarily, therefore, the panel had no occasion to discuss or rule upon the question of the extension of application of COCSA provisions in the absence of an ocean bill of lading.
>
> "In the case at bar, the dock receipt validly extended the application of COGSA in its $500 liability limitation to the entire period that the goods were in the custody of the defendants."

Moreover, the shipper is not relying solely upon the bill of lading as issued, but rather upon its long-form bill of lading and the dock receipt. These documents invoke the limitation at all times while the goods were the shipper's responsibility. The damages, therefore, must be limited to $500.

This leaves only the question of responsibility vis-à-vis the shipper and the stevedore for the loss incurred. As indicated earlier, it would appear that the missing crate was loaded aboard the Morgenster and that the remaining eleven cartons were accidentally left on the pier. On March 22, 1974, a couple of days after the Morgenster had sailed, the stevedores located at least eleven pieces of plaintiff's cargo on the pier.

While the stevedores may be primarily at fault for failure to load all the cargo on the Morgenster, there is a sharp dispute as to who was responsible for the issuance of the erroneous bill of lading since a change in procedures was effected at about that time concerning the method for notifying the shipper of overlooked cargo not intentionally shut out.[8]

Defendant maintains that it was implicitly notified by the stevedore that none of the twelve packages had gone aboard the Morgenster since the face of the dock receipt did not show a partial shutout. The stevedore concedes the importance of advising the shipper of "split shipments" where there has been a partial shutout and acknowledges that, with substantial amounts of shutout cargo, a pier inventory should have been conducted. It claims it must have notified the shipper by phone of its discovery. The evidence failed to resolve this dispute with any certainty.[9/]

This dispute concerning the method of notification then used may not be crucial. These procedures were employed immediately after the sailing of the vessel in question. Since plaintiff's remaining cargo was not located until some days later, the routine method might not have been applicable. This, of course, does not excuse the failure to prepare accurate bills of lading. While the preparation of a split-shipment dock receipt may have been impossible because of lack of time, bills of lading are not released until after the vessel sails and time pressure is minimal.

Although it would appear that the missing freight did go forward on the S.S. Morgenster, no attempt was made by the shipper to account for the unloading or to establish that the missing crate was not in fact aboard the Morgenster. The stevedore argues that, even if it was responsible for the error made in the bill of lading, it was not responsible for the loss of the crate which had in fact gone forward to the right port on the very vessel originally intended. As bailees of the cargo, the stevedore contends that the burden was on the ocean carrier to explain its ultimate loss, citing *David Crystal, Inc. v. Cunard Steam-Ship Co.*, 339 F.2d 295 (2d Cir. 1964), *cert. denied*, 380 U.S. 976 (1965).

The contract between the ocean carrier and the stevedore limited the stevedore's liability to physical damage and fraud.[10] Defendant argues, however, that the failure to account for the cargo constitutes a breach of an implied warranty of workmanlike services, citing *Stein Hall & Co., Inc. v. S.S. Concordia Viking*, 494 F.2d 287, 290 (2d Cir. 1974). It has been held in this Circuit that a warranty of workmanlike service will be implied in maritime service contracts. *Fairmont*

Ship. Corp. v. Chevron Internat'l Oil Co., Inc., 511 F.2d 1252 (2d Cir. 1975), cert. denied, 423 U.S. 838 (1975). The stevedore points to ¶18 of its contract which provides:

> "Entire agreement: This contract constitutes the full agreement between the parties hereto and no warranty of any nature shall be implied from any of the wording of this agreement."

The ocean carrier responds that this is inadequate to dispel the existence of an implied warranty, and that only an express disclaimer will suffice citing Pettus v. Grace Line, Inc., 305 F.2d 151 (2d Cir. 1962).

In the final analysis, we must conclude that both the ocean carrier and the stevedore were, to some degree, negligent and responsible for the issuance of the erroneous bill of lading. However, the burden of proof is on the ocean carrier to show that the stevedore breached its contract. See 17A C.J.S. Contracts §578. Moreover, since the terms of their contract limited the liability of the stevedore to fraud or negligence which causes the cargo loss, and since the ultimate loss was not due to the issuance of the erroneous bill of lading, it would appear that the ocean carrier has not met its burden of proving that the stevedore's negligence was the proximate cause of the loss. *Saugerties Bank v. Delaware & Hudson Co.*, 236 N.Y. 425 (1923). In any event, since the defendant and third-party defendants were concurrently negligent, the claim for indemnity is barred. *Amerocean Steamship Company v. Copp*, 245 F.2d 291 (9th Cir. 1[illegible]57), *McFall v. Compagnie Maritime Belge*, 1952 A.M.C. 1860, 304 N.Y. 314 (1952).

This leaves only the question of counsel fees as between the defendant and third-party defendant. It is well established that the allowance of counsel fees is within the discretion of the court. *Rogers v. United States Lines Company*, 303 F.2d 295, 299 (3d Cir. 1962). Since we conclude that each party's negligence contributed to the defendant's liability, it would be inappropriate to give either attorney's fees under these circumstances.[11] *Toyomenka, Inc. v. S.S. Tosaharu Maru*, 392 F.Supp. 450, 454 (S.D.N.Y. 1974), *reversed* on other grounds, 523 F.2d 518 (2d Cir. 1975).

In conclusion, therefore, the plaintiff is entitled to recovery against the defendant but its recovery, pursuant to the contract of carriage, is limited to $500. The defendant is not entitled to indemnity or attorney's fees from the third-party defendant. Judgment shall be entered accordingly.

SO ORDERED:

Dated: New York, N.Y.,
September 9 , 1976.

Gerard L Goettel
U.S. District Judge

FOOTNOTES:

1 This case was tried by stipulation before the undersigned when a U.S. Magistrate. The parties further stipulated that it could be decided by the undersigned after induction as a U.S. District Judge.

2 On March 15, 1974, according to its tally sheets, I.T.O. loaded aboard the "S.A. MORGENSTER" one crate of the subject shipment pursuant to the shipping request contained in the dock receipt.

3 On March 21, 1974, the S.A. NEDERBURG arrived in Brooklyn, New York and berthed at I.T.O.'s terminal at 59th Street Pier. From March 21 through March 24, 1974, I.T.O. loaded cargo in all hatches of the S.A. NEDERBURG for South and East African ports, including Durban, South Africa. On March 24, 1974, the S.A. NEDERBURG sailed for South and East African ports, including Durban, South Africa.

4 South African Marine Corporation's long-form bill of lading provides, in part:

> "1. This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the U.S. 1936, or of the Carriage of Goods by Sea or similar Act in force in any locality where this bill of lading may be issued. All the provisions of such Act are incorporated herein and except as may be specifically provided herein shall govern throughout the entire time that the goods are in the custody of the carrier . . . "

* * * *

> "13. In case of any loss or damage to or in connection with goods exceeding in actual value $500. lawful money of the United States, per package, or, in case of goods not shipped in packages per customary freight unit, the

> value of the goods shall be deemed to be $500. per package or per unit, on which basis the freight is adjusted and the Carrier's liability, if any shall be determined on the basis of a value of $500. per package or per customary freight unit, or pro rata in case of partial loss or damage, unless the nature of the goods and a valuation higher than $500. shall have been declared in writing by the shipper upon delivery to the Carrier and inserted in this bill of lading and extra freight paid if required and in such case if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be deemed to be the declared value and any partial loss or damage shall be adjusted pro rata on the basis of such declared value."

5 On March 13, 1974, I.T.O. received twelve packages from the shipper's truckers, Coty, and signed Dock Receipt No. 207. On March 22, 1974, two packages out of the shipment of twelve were tallied on board the S.A. NEDERBURG by an I.T.O. checker, A. Renna. On March 23, 1974, five more packages out of the shipment of twelve were tallied on board the S.A. NEDERBURG. On March 24, 1974, four more packages were tallied on board the S.A. NEDERBURG by I.T.O. checker, A. Renna.

6 Paragraph 24 of the long-form bill of lading provides:

> "Exemptions and immunities of all servants and agents of the Carrier. It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any Holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions

in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading."

7 A tally sheet was put in evidence indicating that one piece was placed on the string piece of the pier on that date and that it had not been removed from that point and, therefore, must have been loaded.

8 Defendant maintains that it was the then existing procedure for the stevedore to notify it by sending copies of their delivery receipts of all shutout cargo. From the dock receipts received, a list of shutout cargo was then prepared. "Split shipments" (when only part of the cargo was overlooked) were separately listed by the documentation manager by marking the dock receipt accordingly. The stevedore contends that the practice of sending over dock receipts had been abandoned shortly before the time of the shipment in question and it was notifying the ocean carrier of shutout cargo by telephone call.

9 The stevedore called as a witness its employee responsible for notifying the ocean carrier of situations of this nature. Because of the passage of years he could not recall the specific instance in question, but did testify that, under the circumstances, it would have been his practice to call the defendant and notify one of three employees in its freight department as to what had happened. Defendant did not produce any of these three employees as witnesses, but it is a reasonable assumption that they would have as little present memory as did the stevedore's

employee. There is, however, a written notation on the ocean carrier's dock receipt indicating that "Anthony" had advised that he had stowage for eleven pieces. No evidence was offered as to when this notation was made or its purpose. It does, however, support the stevedore's contention that it gave a notification, albeit somewhat late, of the fact that it held eleven pieces of plaintiff's cargo (and not twelve)

10 Section 5 of the contract provides:

> "With respect to claims for loss or damage to cargo and/or baggage, the liability of the Contractor shall be limited to the physical damage caused by the negligence of the Contractor and to such claims that result from fraud on the part of the employees of the contractor engaged in the delivery, receiving and watching of cargo . . . "

11 The defendant did not tender the admitted liability of $500 to the plaintiff. The third-party defendant did make such a tender to both the defendant and the plaintiff on November 12, 1975, as part of an offer of judgment pursuant to Rule 68, F.R.Civ.P. (Neither party accepted this offer.)

J 33a

UNITED STATES DISTRICT COURT
CHAMBERS OF
JUDGE GERARD L. GOETTEL
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

September 20, 1976

J. T. Kochendorfer, Esq.
Bigham, Englar, Jones & Houston
99 John Street
New York, N.Y. 10038

M. E. DeOrchis, Esq.
Haight, Gardner, Poor & Havens
One State Street Plaza
New York, N.Y. 10004

Robert E. Daley, Esq.
Hill, Rivkins, Carey, Loesberg & O'Brien
916 Fulton Street
New York, N.Y. 10038

Re: Elgie & Company v. S.S. "S.A.
Nederburg" v. I.T.O.
74 Civ. 5112 (GLG)

Gentlemen:

The court's opinion in this case, dated September 9, 1976, contains a clerical error. Please note that the word "shipper" should be changed to "shipline" in the following places:

✓page 4, line 9; ✓page 5, line 1; ✓page 8, line 6;
✓page 16, line 10; ✓page 17, line 14; ✓page 18, lines 5,8,12,16;
✓page 19, line 1; ✓page 20, lines 4,7,19;
✓page 21, line 9; ✓page 22, line 3.

Very truly yours,

Robert A. Marg

Robert A. Margolin
Law Clerk to Judge Goettel

RAM:RS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC
FILED
10-12-76
SDNY

-----------------------------------x

ELGIE & COMPANY, :

Plaintiff, :

-against- :

S.S."S.A.NEDERBURG", her engines, :
boilers, etc., and SOUTH AFRICAN
MARINE CORPORATION, LTD., :

74 Civ. 5112 (GLG)

Defendant and Third- :
Party Plaintiffs,

:

FINAL JUDGMENT

-against- :

INTERNATIONAL TERMINAL OPERATING
COMPANY, INC., :

#76,911

Third-Party Defendant. :

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The issues in the above entitled action having been brought on regularly for trial before the Honorable Gerard L. Goettel, United States District Judge on March 19, 1976, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on September 9, 1976, having handed down its opinion directing that judgment be entered for the plaintiff in the amount of $500.00, it is

ORDERED, ADJUDGED AND DECREED, that plaintiff, ELGIE & COMPANY, have judgment against the defendants, S.S."S.A.NEDERBURG", Her Engines, Etc., and SOUTH AFRICAN

JUDGMENT ENTERED 10/13/76
Raymond F. Burghardt
CLERK

MARINE CORPORATION, LTD., in the amount of $500.00. Defendant SOUTH AFRICAN MARINE CORPORATION, LTD.'s claim for indemnity against the Third-Party Defendant is barred.

Dated: New York, New York
October 6, 1976.

Gerard L. Goettel
USDJ

[illegible]
USDC SD of
N.Y 10/14/76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------x

ELGIE & COMPANY,

Plaintiff,

-against-

S.S."S.A.NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant and Third-Party Plaintiffs,

-against-

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

Third-Party Defendant.

---------------------------------------x

74 Civ. 5112 (GLG)

NOTICE OF APPEAL

NOTICE is hereby given that ELGIE & COMPANY, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from only so much of the final judgment entered herein on the 13th day of October, 1976, which limits plaintiff's recovery to $500.00.

Dated: New York, New York
October 14, 1976.

Yours, etc.

BIGHAM ENGLAR JONES & HOUSTON

By
A Member of the Firm
Office & P. O. Address:
99 John Street
New York, New York 10038
Telephone: 732-4646

To:
Messrs. HAIGHT GARDNER POOR
& HAVENS
Attorneys for Defendant and
Third-Party Plaintiff
One State Street
New York, New York

Messrs. HILL RIVKINS CAREY LOESBERG
& O'BRIEN
Attorneys for Third Party Defendant
96 Fulton Street
New York, New York

Filed
USDC SD of NY
11/8/76

OFFICE COPY
DO NOT REMOVE FROM FILE
B. E. J. & H.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

------------------------------------x

ELGIE & COMPANY, :

Plaintiff, :

-against- : **NOTICE OF APPEAL**

S.S "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD., : 74 Civ. 5112 (GLG)

Defendant and Third-Party Plaintiff, :

in mail

-against- :

INTERNATIONAL TERMINAL OPERATING COMPANY, INC., :

Third-Party Defendant. :

------------------------------------x

Notice is hereby given that SOUTH AFRICAN MARINE CORPORATION, LTD., defendant and third-party plaintiff in the above captioned matter, and owners of the S.S. "S.A. NEDERBURG", hereby appeals to the United States Court of Appeals for the Second Circuit from the Opinion filed in this action on September 9, 1976 and the Final Judgment entered on October 13, 1976 with respect to: awarding Judgment in favor of plaintiff; and barring defendant SOUTH AFRICAN MARINE CORPORATION, LTD.'s claim for indemnity against third-party defendant INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

Dated: New York, New York
November 8, 1976

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant and
Third-Party Plaintiff

By____________________________
A Member of the Firm
One State Street Plaza
New York, New York 10004

TO:

BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Plaintiff
99 John Street
New York, New York 10038

HILL, RIVKINS, CAREY, LOFSBERG & O'BRIEN
Attorneys for Third-Party Defendant
96 Fulton Street
New York, New York 10038

J 40a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--------------------------------------x

ELGIE & COMPANY,
Plaintiff,

-against-

S.S. "S.A. NEDERBURG", her engines, boilers, etc.,

-and against-

SOUTH AFRICAN MARINE CORPORATION, LTD.,
Defendant.

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CIVIL ACTION
FILE NO.__________

COMPLAINT

1. This is a case of non-delivery of cargo, civil and maritime, and is an admiralty and maritime claim within the meaning of Rule 9 (h). Plaintiff invokes the maritime procedures specified in Rule 9 (h).

2. Plaintiff is a legal entity established in accordance with law, with its principal office at 54-55 Gardiner Street, Durban, South Africa. Defendant SOUTH AFRICAN MARINE CORPORATION, LTD. is a foreign corporation established in accordance with law, with an office and place of business in South Africa and having as its agent South African Marine Corporation ((N.Y.), at 17 Battery Place, New York, New York.

3. During all the times herein mentioned defendant SOUTH AFRICAN MARINE CORPORATION,LTD. was the owner and operator of the S.S. "S.A. NEDERBURG" and operated it in the common carriage of goods by water for hire between the ports of New York and Durban,South Africa.

4. The S.S. "S.A. NEDERBURG" is now or during the pendency of this action will be, within this District.

5. On or about March 15, 1974 Shuron Continental, a textron company, delivered 11 cartons and one (1) crate of optical machinery and accessories to defendant SOUTH AFRICAN MARINE CORPORATION, LTD. as a common carrier at New York, in good condition, for transportation on the S.S. "S.A. NEDERBURG" to Durban, South Africa and delivery to plaintiff in consideration of an agreed freight, and pursuant to the valid terms of a bill of lading issued by defendant SOUTH AFRICAN MARINE CORPORATION, LTD. and the S. S. "S.A. NEDERBURG".

6. Although defendant SOUTH AFRICAN MARINE CORPORATION, LTD. issued the aforementioned bill of lading, claused "on board", one (1) crate of the subject cargo, had, in fact, not been laden and on or about April 29, 1974 the S.S."S.A. NEDERBURG" arrived at Durban and failed to deliver one (1) crate of the subject shipment.

7. Having relied upon the validity of the aforementioned "on board" bill of lading, prior to April 29, 1974, plaintiff became for value the owner of said shipment and the owner and holder of said "on board" bill of lading, and brings this suit on its own behalf and that of all others interested in said shipment/

8. All conditions precedent required of plaintiff and of all others interested in said shipment have been performed.

9. By reason of the premises, plaintiff and those on whose behalf this suit is brought have sustained damages in the sum of $11,500.00, as nearly as the same can now be estimated, no part of which has been paid although duly demanded.

WHEREFORE, plaintiff prays:

1. That the S.S. "S. A. MEDERBURG" be arrested;

2. That process issue against defendants, and that defendants be cited to appear and answer the allegations of the complaint.

3. That an interlocutory judgment be entered in favor of the plaintiff against the S. S. "S. A. "MEDERBURG" and against the defendant directing that the plaintiff

recover its damages and that the S. S. "S. A. NEDERBURG" be condemned and sold and the proceeds of sale applied to the payment to plaintiff of the sums found due it;

4. That the amount due plaintiff be computed by further proceedings before a Commissioner, pursuant to Rule 53 (b) and/or by further proceedings before the Court, pursuant to Rule 42 (b);

5. That final judgment against defendants and the S. S. "S.A. NEDERBURG" be entered in favor of the plaintiff for the amount found due plaintiff with interest and with costs; and

6. That plaintiff have such other and further relief as may be just.

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Plaintiff

VINCENT L. LEIBELL, JR.
By__________________________
A Member of the Firm

Office & P. O. Address:
99 John Street
New York, New York 10038
732-4646

J 44d

STATE OF NEW YORK (
; SS.:
COUNTY of NEW YORK(

VINCENT L. LEIBELL, JR. being duly sworn, deposes and says:

I am a member of the firm of BIGHAM, ENGLAR, JONES & HOUSTON, attorneys for the plaintiff in this action.

I have read the foregoing complaint, know the contents thereof, and the same are true to the best of my knowledge, information and belief.

The sources of my information and the grounds of my belief are documents in the possession of my firm.

The reason this verification is made by me and not by Elgie & Company is that Elgie & Company is a corporation, no officer of which is now within this District.

VINCENT L. LEIBELL, JR.

Sworn to before me this
2d day of November
1974.

SEAL

FRANCES M. TRANCHIDA
Notary Public, State of New York
No. 41-2695850
Qualified in Queens County
Commission Expires March 30, 1975

J 45a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

ELGIE & COMPANY,

Plaintiff,

-against-

S.S. "S.A. NEDERBURG", her engines, boilers, etc.,

-and against-

SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendants

-----------------------------------x

INTERROGATORIES PROPOUNDED BY PLAINTIFF TO DEFENDANTS TO BE ANSWERED IN WRITING AND UNDER OATH

1. Please examine the annexed document marked Exhibit "A".

   a. Is it not a copy of the bill of lading covering the shipment described in the complaint. If not, how does it differ?

   b. Was not the original issued by or on behalf of the Master of the S.S. "S.A. NEDERBURG"?

   c. Was not the original issued by or on behalf of defendant SOUTH AFRICAN MARINE CORPORATION, LTD.?

   d. State the name of the individual and concern who validated the annexed bill of lading "on board", and on what basis was this done?

2. Describe in detail the relationship of the defendant to the S.S. "S.A. NEDERBURG".

3. On or about March 15, 1974 at New York, New York did defendant SOUTH AFRICAN MARINE CORPORATION, LTD. receive a shipment of 11 cartons and 1 crate of optical machinery and accessories, evidenced by the bill of lading annexed hereto as Exhibit "A" and which is the subject of this action, which was to be transported aboard the S.S. "S. A. NEDERBURG" to Durban, South Africa.

4. State whether any receipts, other than the annexed bill of lading, were issued for the subject shipment at the Port of Loading.

5. If your answer to No. 4 is affirmative:

a. Set forth the terms and conditions of such receipts or attach a true copy of same.

b. Name the person or concern to which such receipts were given.

c. Were there any notations of damage or exceptions of any kind as to the condition of the shipment made upon such receipts; if so, set forth the text of the notations or exceptions.

6. Were any exceptions noted by the defendant or its agents as to the condition and appearance of the shipment at the time of their receipt at the Port of Loading other than the receipt heretofore mentioned, and if so, what exceptions were so noted?

7. Was the subject shipment laden aboard the S.S. "S.A. NEDERBURG"? If so, state when the subject shipment was laden aboard the S.S."S.A. NEDERBURG"?

8. State the stowage given on the S.S."S. A. NEDERBURG", including hatch numbers, deck, hold and compartment.

9. Were any loading tallies prepared by defendant, its agents or employees? If so,

a. State by whom such tallies were made, giving the name, address and job title;

b. State in whose possession such tally is or was when the defendant last saw or heard of it;

c. Set forth a complete description of each such tally and notations it bore or attach a copy or copies to your answers.

10. Was the subject shipment discharged from the S. S. "S. A. NEDERBURG"? If so, state when and where the subject shipment was discharged from the S.S."S.A.NEDERBURG"?

11. State precisely and in detail the quantity and condition of the subject shipment when discharged.

12. State if discharging tallies were prepared in Durban, South Africa, and if so, by whom and in whose possession are these tallies.

13. Describe each such tally and notations thereon or attach a true and complete copy of each to your answers.

14. Was the subject shipment delivered to plaintiff, or his agent, if so, state when.

15. State if delivery receipts were executed, and if so, by whom and in whose possession are these delivery receipts.

16. Describe each such delivery receipt and notations thereon or attach a true and complete copy of each to your answers.

Yours, etc.

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Plaintiff

By VINCENT L. LEIBELL, JR.
A Member of the Firm

Office & P. O. Address:
99 John Street
New York, New York 10038
732-4646

EXHIBIT "A"

See opposite page

SOUTH AFRIC[illegible] MARINE CORPORATION ([illegible] Y.), as Agents

SHIPPER/EXPORTER

[illegible] CONTINENTAL
40 [illegible] ST.
[illegible], NEW YORK

DOCUMENT NO.

EXPORT REFERENCES

FORWARDING AGENT, REFERENCES

[illegible] 11321-02

CONSIGNEE

ORDER OF SHIPPER

POINT AND COUNTRY OF ORIGIN

NOTIFY PARTY

ELGIE & COMPANY
P.O. BOX 1099
DURBAN

DOMESTIC ROUTING/EXPORT INSTRUCTIONS

RECEIVED ON BOARD

MAR 22 1974

PIER

EXPORTING CARRIER *(Vessel and Flag)*

S.A. NEDERBURG

PORT OF LOADING

ONWARD INLAND ROUTING

PER

PORT OF DISCHARGE

FOR TRANSSHIPMENT TO

Spaces above are for shippers' memoranda—not part of Bill of Lading

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	[illegible]
ELGIE & COMPANY PO BOX 1099 54-55 GARDINER ST DURBAN SOUTH AFRICA	11 1	FW.CTNS:) OPTICAL MACHINERY & CRATE:) ACCESSORIES.	4512	38
403M, 291M, 290M 289M, 2COM, 287M 286M.		L/C# FB 1395 "FREIGHT PREPAID" ON BOARD G-DEST. SOUTH AFRICA	Freight Prepaid	

These Commodities licensed by the U.S. for Ultimate Destination ___ Diversion Contrary to U.S. Law Prohibited.

*as identified on the reverse side and referred to herein as "the carrier." Neither South African Marine Corporation (N.Y.), nor any other person, firm or corporation other than the carrier, whether or not its name is stated elsewhere herein, assumes any of the duties, responsibilities and liabilities stated herein as being those of the carrier.

Ship operated for account of:->
(See on reverse side)

FREIGHT:

.... @ .... per 40 cu. ft.	$
.... @ .... per 40 cu. ft.	$
.... @ .... per 2240 lbs.	$
.... @ .... per 2240 lbs.	$
.... @	$
.... @	$
TOTAL FREIGHT	$

In witness whereof 3 (Three) Bills of Lading, all of the same tenor have been signed, one of which being accomplished the others to stand void.

B/L No.

Month Day Year 19

DATED AT PORT OF LOADING, SHOWN ABOVE

Ex A-1 (Complaint)

FOR AND ON BEHALF OF MASTER

By ____________
AS AGENTS ONLY

SOUTH AFRICAN MARINE CORPORATION, LTD. (Carrier No. 1)

SPRINGBOK LINE, LTD. (Carrier No. 2).

SPRINGBOK SHIPPING COMPANY, LTD. (Carrier No. 3)

SHURON CONTINENTAL

B. P. CENTRE,
THIBAULT SQUARE, CAPETOWN
REPUBLIC OF SOUTH AFRICA

GENERAL AGENTS
IN U.S.A.:
SOUTH AFRICAN MARINE CORPORATION (N.Y.)
17 BATTERY PLACE
NEW YORK, N. Y. 10004

Telegrams: "Safmarco, New York"

SHORT FORM BILL OF LADING

RECEIVED the goods, or packages said to contain goods herein mentioned, in apparent good order and condition unless otherwise indicated to be transported and delivered or transhipped as herein provided.

This Short Form Bill of Lading is issued for the shipper's convenience and at its request, instead of the carrier's regular form of Bill of Lading. It shall have the effect subject to the provisions of the U.S. Carriage of Goods by Sea Act, 1936, or of the Carriage of Goods by Sea or similar Act in force in the locality where this Bill of Lading is issued.

All the terms of the carrier's regular form of Bill of Lading are incorporated herein with like force and effect as if they were written at length herein. A copy of such Bill of Lading is on file with the Federal Maritime Commission of the U.S.A. and may be obtained from the carrier, it's agents or the master.

Particular attention is called to the following provisions in the Carrier's Regular Form Bill of Lading:

The vessel, with any part of the goods on board, either before or after proceeding toward the port of discharge and for any purpose whatever that the master may consider advisable, may stay in port, adjust compasses, dock, go on ways or to repair yards, shift berths, lie on the bottom in berth, move from place to place in any port, take fuel or stores, load or discharge cargo, sail without pilots, tow and assist vessels or be towed, save life, property of the carrier or others, proceed via the Panama Canal and/or Straits of Magellan and/or Cape Horn and/or Suez Canal and/or Cape of Good Hope or otherwise by any route or through any waters whatever. The vessel may omit calling at any port, whether scheduled or not, may deviate from, or change the advertised, usual, geographical or intended route at any stage of the voyage and may proceed beyond or in a contrary direction to or outside the usual route to the port of discharge and may proceed to and stay at and load or discharge at any place whatever, as inducements may offer, backwards or forwards, once or oftener, and may load, carry or discharge cargo at, for or between intermediate or other ports, whether on this voyage or a preceding or subsequent voyage, even though two or more of such voyages may overlap. Any such procedure shall be considered within the voyage herein intended as fully as if specifically described herein.

Without limitation of any other provision herein, in any situation whatever or wherever occuring and whether existing or anticipated before commencement of, or during the voyage, which, in the judgment of the carrier is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to, or loss of the ship or any part of the cargo or to make it unsafe, imprudent or unlawful for any reason to commence or continue the voyage, or to give rise to delay or difficulty in arriving, entering, discharging at or leaving the port of discharge or the usual or intended place of discharge in such port, the carrier may decline to load, or before or after loading or before the commencement of the voyage may require the shipper or other person entitled thereto, to take delivery of the goods at port of shipment and on their failure to do so, may warehouse the goods at their risk and expense; or the carrier, whether or not proceeding toward or attempting to enter the port of discharge, may proceed by any route or return directly or indirectly to or stop at such other port or place whatever as the carrier may consider safe or advisable under the circumstances, once or oftener, backwards or forwards in any order and discharge the goods at any place he may select there, or the carrier may retain the cargo on board until a return trip or until such time as the carrier thinks advisable and discharge the goods at any place whatever as herein provided, or the carrier may discharge and forward the goods by any means whatever, all at the risk and expense of the goods. The carrier is not required to give notice of discharge or forwarding. Whenever the goods are discharged from the ship they shall be at their own risk and expense. Such discharge shall constitute complete delivery and performance under this contract and the carrier shall be free from any further responsibility. The carrier shall be entitled to a reasonable extra compensation for any services in connection with the foregoing above the agreed freight.

Full freight to port of discharge named herein shall be considered completely earned on receipt of the goods by the carrier, whether the freight be stated or intended to be prepaid or to be collected at destination; and the carrier shall be entitled absolutely to all freight and all charges due hereunder, whether actually paid or not, and to receive and retain them under all circumstances whatever, ship and/or cargo lost or not lost. Freight is payable to ship's agent by transferable currency. Rate of exchange for payment of freight will be the applicable Bank T/T selling rate on New York prevailing on date of payment or on date of vessel's arrival at the port of discharge whichever date is earlier.

All agreements or freight engagements for shipment of goods are superseded by this Bill of Lading and all its terms, whether written, typed, stamped or printed, or incorporated by reference are agreed by the shipper to be binding and to govern the relations, whatever they may be, between those included in the words "shipper" and "carrier" as defined in the carrier's regular form of Bill of Lading. One signed Bill of Lading duly endorsed, will be surrendered, if requested, to the agent of the vessel at port of discharge in exchange for delivery order.

(CONTINUED ON REVERSE SIDE)

Ex A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

..................................x

ELGIE & COMPANY, :
Plaintiff, :
- against - :
S.S. "SA.A. NEDERBURG", her engines, boilers, etc., :
- and against - :
SOUTH AFRICAN MARINE CORPORATION, LTD., :
Defendant. :

..................................x

ANSWER
74 Civ. 5112

COPY RECEIVED
JUN 12 1975
Bigham, Englar, Jones & Houston

Defendant, South African Marine Corporation, Ltd., by its attorneys, Haight, Gardner, Poor & Havens, for its Answer to the Complaint herein, alleges upon information and belief as follows:

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 1 of the Complaint.

2. Admits that Defendant, South African Marine Corporation, Ltd., is a foreign corporation established in accordance with law, with an office and place of business in South Africa and having as its agent South African Marine Corporation (N.Y.) at 17 Battery Place, New York, New York, but except as so specifically admitted, denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 2 of the Complaint.

3. Admits that during all the times herein mentioned, Defendant South African Marine Corporation, Ltd., was the owner and operator of the S.S. "S.A. NEDERBURG" and operated it in the ocean carriage of goods by water for hire between the ports of New York and Durban, South Africa, but except as so specifically admitted, denies each and every allegation contained in Paragraph 3 of the Complaint.

4. Denies each and every allegation contained in Paragraph 4 of the Complaint.

5. Admits that on or about March 15, 1974, Shuron Continental, delivered one (1) crate said to contain optical machinery and accessories to Defendant South African Marine Corporation, Ltd., at New York, in apparent good condition for transportation on the S.S. "S.A. NEDERBURG" to Durban, South Africa in consideration of an agreed freight and pursuant to the terms of a bill of lading issued by Defendant South African Marine Corporation, Ltd., but except as so specifically admitted, denies each and every allegation contained in Paragraph 5 of the Complaint.

6. Defendant South African Marine Corporation, Ltd. admits that the S.S. "S.A. NEDERBURG", arrived in Durban on or about April 29, 1974, and failed to delivered one (1) crate of the subject shipment, but denies each and every allegation contained in Paragraph 6 of the Complaint

7. Denies each and every allegation contained in Paragraph 7 of the Complaint.

8. Denies each and every allegation contained in Paragraph 8 of the Complaint.

9. Denies each and every allegation contained in Paragraph 9 of the Complaint.

FURTHER ANSWERING THE COMPLAINT, AND FOR A FIRST, SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANT SOUTH AFRICAN MARINE CORPORATION, LTD., ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

10. Repeats and realleges each and every admission, denial and denial of knowledge or information contained in Paragraphs 1 through 9, inclusive of this Answer, with the same force and effect as if herein set forth at length.

11. Any shortage, loss and/or damage to the goods was due to causes for which neither the carrier nor the ship was liable or responsible for by virtue of the provisions of the Carriage of Goods by Sea Act, approved April 16, 1936, and/or Harter Act, and/or applicable tariffs, and/or the provisions of the said bill of lading included but not limited to the $500 package limitation.

12. That the terms and conditions of the South African Marine Corporation Ltd., standard bill of lading were and are expressly incorporated in the dock receipt and in the bill of lading and are applicable to the shipment in suit.

13. That Clause No. 1 of said standard bill of lading provides that the U.S. Carriage of Goods by Sea Act as well as the contractual provisions of the contract of carriage are applicable during the entire period the shipment was in the custody of the carrier. Clause No. 1 states in part:

> "This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the U.S., 1936 or the Carriage of Goods by Sea or similar Act in force in any locality where this bill of lading may be issued. All the provisions of such Act are incorporated herein and except as may be specifically provided herein shall govern throughout the entire time that the goods are in the custody of the carrier and nothing herein contained shall be considered a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. . . ."

14. That Clause 13 of said standard bill of lading provides that any loss shall be limited to $500 per package for any damage, loss or shortage occurring while in the possession of the carrier. Clause 13 reads as follows:

> "In case of any loss or damage to or in connection with goods exceeding in actual value $500 lawful money of the United States, per package, or in case of goods not shipped in packages per customary freight unit, the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the Carrier's liability, if any shall be determined on the basis of a value of $500 per package or per customary freight unit, or pro rata in case of partial loss or damage, unless the nature of the goods and a valuation higher than $500

shall have been declared in writing by the shipper upon delivery to the Carrier and inserted in this bill of lading and extra freight paid if required and in such case, if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be deemed to be the declared value and any partial loss or damage shall be adjusted pro rate on the basis of such declared value. If the value of the goods is less than $500 the valuation in the calculation and adjustment of claims is understood that the meaning of the word "package" includes pieces and articles of any description except goods shipped in bulk".

WHEREFORE, Defendant South African Marine Corporation, Ltd., demands judgment dismissing the Complaint, together with costs and disbursements of this action, and for such other and further relief as in the premises may be just.

Dated: New York, New York
June 11, 1975

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant,
SOUTH AFRICAN MARINE CORPORATION, LTD.

By Jno. E. DeOrchis
A Member of the Firm
One State Street Plaza
New York, N. Y. 10004

TO: BIGHAM, ENGLAR, JONES
& HOUSTON
Attorneys for Plaintiff
99 John Street
New York, N. Y. 10038

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

.....................................x

ELGIE & COMPANY,

Plaintiff,

- against -

S.S. "S.A. NEDERBURG", her engines, boilers, etc. and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendants and Third Party Plaintiffs,

- against -

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third Party Defendant.

.....................................x

THIRD PARTY COMPLAINT

74 Civ. 5112

Defendant and Third Party Plaintiff, SOUTH AFRICAN MARINE CORPORATION, LTD., by its attorneys, Haight, Gardner, Poor & Havens, complaining of the above-named Third Party Defendant alleges upon information and belief as follows:

1. This is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

2. On or about November 21, 1974, a Complaint was filed in the United States District Court for the Southern District of New York by Elgie & Company against the S.S. "S.A. NEDERBURG" and South African Marine Corporation, Ltd., to recover $11,500 for the alleged loss

one (1) crate of optical equipment carried onboard the S.S. "S.A. NEDERBURG", from New York, New York to Durban, South Africa. A copy of the Complaint is annexed hereto and marked Exhibit "A".

3. At all times hereinafter mentioned, Third Party Defendant, International Terminal Operating Co., Inc., was and still is a corporation organized and existing under and by virtue of the laws of the State of New York, and has been and is still doing business within this district with an office and principal place of business situated at 17 Battery Place, New York, New York.

4. At all times hereinafter mentioned, Defendant and Third Party Plaintiff, South African Marine Corporation, Ltd., was and still is a foreign business entity organized and existing under and by virtue of the laws of the Republic of South Africa and was and now is engaged in business as an ocean carrier of merchandise for hire and owned and operated the S.S. "S.A. NEDERBURG".

5. At all times pertinent to the Complaint of the Plaintiff and Third Party Complaint, Third Party Defendant, International Terminal Operating Co., Inc. agreed to furnish stevedoring and terminal services to the vessel under the ownership and operation of South African Marine Corporation, Ltd., including loading and caring for the shipment in suit.

6. On or about March 13, 1974, the cargo mentioned in the Complaint was delivered to International Terminal Operating Co., Inc.'s custody for eventual loading aboard one of Third Party Plaintiff's vessels, the S.S. "S.A. NEDERBURG". International Terminal Operating Co., Inc. acknowledged receipt of the entire shipment pursuant to the valid terms of the agreement between International Terminal Operating Co., Inc. and South African Marine Corporation.

7. That if the shipment in suit was lost, as alleged by the plaintiff, such loss occurred when the goods were in the custody, care and control of Third Party Defendant, International Terminal Operating Co., Inc.

8. If the plaintiff suffered any damages as alleged in the Complaint, the same are improperly attributed to the acts of Defendant and Third Party Plaintiff, but were actually caused by the actual fault, neglect, act or omission of the Third Party Defendant and in violation of International Terminal Operating Co., Inc.'s warranty to perform its services in a workmanlike manner.

9. By reason of the foregoing, Third Party Defendant is primarily liable for any and all damages sustained by the Plaintiff and said Third Party Defendant is obligated to indemnify the Third Party Plaintiff for

any and all damage that may be imposed upon it by reason of the occurrences described in the Complaint of Plaintiff herein.

WHEREFORE, Defendant and Third Party Plaintiff demands judgment against Third Party Defendant for all such sums which may be recovered by the Plaintiff against the Defendant and Third Party Plaintiff in this action together with reasonable counsel fees, costs and disbursements of this action.

Dated: New York, New York
June 6, 1975

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendants
and Third Party Plaintiffs

By Leroy S Corsa
A Member of the Firm
One State Street Plaza
New York, N. Y. 10004
(212) 344-6800

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELGIE & COMPANY,

Plaintiff,

- against -

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant and
Third-Party Plaintiffs,

- against -

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant.

Index No.:
74 Civ. 5112 (RO)

ANSWER OF THIRD-PARTY DEFENDANT TO COMPLAINT AND THIRD-PARTY COMPLAINT AND COUNTERCLAIM

in mail
2
Bigham, Englar, Jones & Houston

Third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., (Hereinafter referred to as ITO), by its attorneys, Hill, Rivkins, Carey, Loesberg & O'Brien, for its answer to the complaint and third-party complaint herein, alleges on information and belief as follows:

FOR ITS ANSWER TO THE PLAINTIFF'S COMPLAINT

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "1", "2", "3", "4", "5", "6", "7", "8" and "9", of the plaintiff's complaint.

FURTHER ANSWERING AND AS A FIRST AFFIRMATIVE COMPLETE DEFENSE TO PLAINTIFF'S COMPLAINT

2. The plaintiff fails to state a cause of action against the third-party defendant, ITO.

FURTHER ANSWERING AND AS A SECOND AFFIRMATIVE COMPLETE DEFENSE TO PLAINTIFF'S COMPLAINT

3. If the plaintiff suffered any damages, which is denied, said damages were caused solely by the fault and/or negligence of the plaintiff and/or their agents or by the defendant-third-party plaintiff, SOUTH AFRICAN MARINE CORPORATION, LTD., for which the third-party defendant is not liable.

FURTHER ANSWERING AND AS A THIRD AFFIRMATIVE COMPLETE DEFENSE TO PLAINTIFF'S COMPLAINT

4. The terms and provisions of the United States Carriage of Goods by Sea Act of 1936, 46 U.S.C.A. §1300 et seq..

FURTHER ANSWERING AND AS A FOURTH AFFIRMATIVE COMPLETE DEFENSE TO PLAINTIFF'S COMPLAINT

5. The terms and provisions of the Harter Act, 46 U.S.C.A. §190 et seq..

FURTHER ANSWERING AND AS A FIFTH AFFIRMATIVE COMPLETE DEFENSE TO PLAINTIFF'S COMPLAINT

6. Third-party defendant, ITO, claims all the benefits of the bill or bills of lading issued by the defendant/third-party plaintiff, SOUTH AFRICAN MARINE CORP., LTD., which constitute the contract of carriage between the owners of the contents of the shipment

which are the subject of this action and which contract inures to the benefit of third-party defendant, ITO.

FURTHER ANSWERING AND AS A SIXTH AFFIRMATIVE COMPLETE DEFENSE TO PLAINTIFF'S COMPLAINT

7. Third-party defendant, ITO, claims that it is not liable to the plaintiff in accordance with the terms of the contract between the defendant/third-party plaintiff, SOUTH AFRICAN MARINE CORP., LTD., and third-party defendant, ITO.

FURTHER ANSWERING AND AS A SEVENTH AFFIRMATIVE COMPLETE DEFENSE TO PLAINTIFF'S COMPLAINT

8. Third-party defendant, ITO, at all times performed their duties and obligations in a workmanlike manner.

FOR ITS ANSWER TO THE THIRD-PARTY PLAINTIFF'S COMPLAINT

9. Admits the allegations contained in paragraph "1" of the third-party complaint.

10. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "2" of the third-party plaintiff's complaint.

11. Admits the allegations as contained in paragraph "3" of the third-party plaintiff's

complaint, except that it denies that the State of incorporation of the third-party defendant, ITO, is New York.

12. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph "4" of the third-party plaintiff's complaint.

13. Admits that third-party defendant, ITO, performs terminal and stevedoring services for the third-party plaintiff's vessels and cargoes and except as herein admitted, denies the allegations contained in paragraph "5" of the third-party complaint.

14. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph "6" of the third-party plaintiff's complaint.

15. Denies the allegations contained in paragraphs, "7", "8" and "9" of the Third-party complaint.

FURTHER ANSWERING AS A FIRST AFFIRMATIVE COMPLETE DEFENSE TO THE THIRD-PARTY COMPLAINT

16. Third-party defendant, ITO, claims the benefit of the United States Carriage of Goods by Sea Act of 1936, The Harter Act, and also the package limitation contained therein.

FURTHER ANSWERING AS A SECOND AFFIRMATIVE COMPLETE DEFENSE TO THE THIRD-PARTY COMPLAINT

17. Third-party defendant, ITO, claims all the benefits of the bill or bills of lading issued by the defendant/third-party plaintiff, SOUTH AFRICAN MARINE CORP., LTD., which constitute the contract of carriage between the defendant/third-party plaintiff and the owners of the contents of the shipment which are the subject of this action and which contract inures to the benefit of the third-party defendant, ITO.

FURTHER ANSWERING AS A THIRD AFFIRMATIVE COMPLETE DEFENSE TO THE THIRD-PARTY COMPLAINT

18. Third-party defendant, ITO, claims that it is not liable to either the plaintiff or the defendant/third-party plaintiff in accordance with the contract between the third-party defendant, ITO, and the defendant/third-party plaintiff, SOUTH AFRICAN MARINE CORP., LTD.

FURTHER ANSWERING AS A FOURTH AFFIRMATIVE COMPLETE DEFENSE TO THE THIRD-PARTY COMPLAINT

19. That if the plaintiffs sustained any damages, which is denied, it was caused solely by the fault and/or negligence of the defendant/third-party plaintiff for which the third-party defendant is not liable.

FURTHER ANSWERING AS A FIFTH AFFIRMATIVE COMPLETE DEFENSE TO THIRD-PARTY COMPLAINT

20. That the third-party defendant, ITO, was acting solely as the agent for the third-party plaintiff, SOUTH AFRICAN MARINE CORP., LTD., and if there was any misdelivery, non-delivery and/or deviation concerning plaintiff's goods, which is denied, it was caused solely by the fault and/or neglect of the defendant/third-party plaintiff.

AS FOR A COUNTERCLAIM AGAINST THE THIRD-PARTY PLAINTIFF BY THE THIRD-PARTY DEFENDANT

21. Third-party defendant repeats and realleges each and every allegation of paragraphs "9" and "15" as if fully set forth at length herein.

22. That at all times hereinafter mentioned the third-party defendant, ITO, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware with an office and place of business situated at 17 Battery Place, New York, New York 10004.

23. That all times hereinafter mentioned the defendant/third-party plaintiff, SOUTH AFRICAN MARINE CORP., LTD., is a corporation organized and existing under and by virtue of

the laws of a foreign country, with an office and place of business situated at 17 Battery Place, New York, New York.

24. That if the plaintiff suffered any loss and/or damage, which is denied, the loss and/or damage was caused solely by the fraud, negligence and/or fault of the defendant/third-party plaintiff and/or their agents.

25. That if the third-party defendant is found responsible for any of the loss and/or damage sustained by the plaintiff, the third-party defendant is entitled to indemnification from the defendant/third-party plaintiff for all losses and/or damages including the costs of this action.

WHEREFORE, the third-party defendant, ITO, demands judgment against the defendant/third-party plaintiff, SOUTH AFRICAN MARINE CORP., LTD., and prays that the plaintiff's and third-party plaintiff's complaint be dismissed as against the third-party defendant, and that the third-party defendant be awarded the costs and expenses in defending this action, and for such other further relief as to this Court may seem just.

Dated: New York, New York
June 23rd, 1975

Yours etc.,

HILL RIVKINS CAREY LOESBERG & O'BRIEN
Attorneys for Third-party Defendant,
Int'l Terminal Operating Co., Inc.

By: /S/

ROBERT E. DALEY
Attorney of Record

96 Fulton Street
New York, New York 10038
(212) 233-6171

TO: BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Plaintiff
99 John Street
New York, New York 10038

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant/third-party plaintiff
One State Street Plaza
New York, New York 10004

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

..................................x

ELGIE & COMPANY,

Plaintiff,

- against -

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant and Third Party Plaintiffs,

- against -

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third Party Defendant.

..................................x

REPLY TO THIRD PARTY DEFENDANT'S COUNTERCLAIM AGAINST THIRD PARTY PLAINTIFF

74 Civ. 5112 (RO)

COPY RECEIVED
Mail
JUN 27 1975
Bigham, Englar, Jones & Houston

Defendant and Third Party Plaintiff, South African Marine Corporation, Ltd., by its attorneys, Haight, Gardner, Poor & Havens, respectfully alleges upon information and belief as follows:

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 22 of Third Party Defendant's Answer and Counterclaim.

2. Admits that at all times hereinafter mentioned, the Defendant and Third Party Plaintiff, South African Marine Corp., Ltd., is a corporation organized and existing under and by virtue of the laws of a foreign

country, with an agent with a place of business situated at 17 Battery Place, New York, New York.

3. Denies each and every allegation contained in Paragraph 24 of Third Party Defendant's Answer and Counterclaim.

4. Denies each and every allegation contained in Paragraph 25 of Third Party Defendant's Answer and Counterclaim.

WHEREFORE, Third Party Plaintiff, South African Marine Corporation, Inc., demands judgment against Third Party Defendant, International Terminal Operating Co., Inc. for all sums that may be adjudged against it in favor of the Plaintiff, as well as counsel fees and other expenses incurred by said Third Party Plaintiff, South African Marine Corporation, Inc.

Dated: New York, New York
June 25, 1975

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant and
Third Party Plaintiffs,

By______________________
A Member of the Firm
One State Street Plaza
New York, N. Y. 10004

TO: BIGHAM, ENGLAR, JONES
& HOUSTON
Attorneys for Plaintiff
99 John Street
New York, N. Y. 10038

HILL, RIVKINS, CAREY, LOESBERG
& O'BRIEN
Attorneys for Third Party Defendant
96 Fulton Street
New York, N. Y. 10038

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

..................................x

ELGIE & COMPANY,

Plaintiff,

- against -

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant and Third Party Plaintiffs,

- against -

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third Party Defendant.

..................................x

INTERROGATORIES

74 Civ. 5112 (RO)

COPY RECEIVED
in mail
21 19[illegible]
Bigham, Englar, Jones & Houston

S I R S :

PLEASE TAKE NOTICE that the Defendant and Third Party Plaintiff, South African Marine Corporation, Ltd., requests the Plaintiff, Elgie & Company, to answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. Set forth the names and addresses of the offices of Plaintiff at the time of the shipment in question.

2. Set forth the monetary interest Plaintiff has in the claim and the monetary interest which any other individual, corporation or insurance company has in the claim.

3. Set forth the names and addresses of all parties who had, have now, or may later have an interest

in this claim, i.e., the names and addresses of the parties whose interests Plaintiff claims to represent in the Complaint.

4. Set forth the name and address of the party who owned the shipment at the time it was loaded on board the vessel.

5. Set forth the name and address of the party who owned the shipment at the time it was delivered by the vessel at the port of discharge.

6. State when and where and by what means, Plaintiff became the owner of the shipment in suit.

7. State in detail, how the sum alleged in the addendum clause of the Complaint is computed.

8. Set forth the type and extent of loss sustained by the shipment, identifying the damaged cargo by marks and numbers.

9. Set forth:

a) when, where and by whom the damage listed in the Answer to the previous interrogatory was ascertained;

b) the documentary evidence in support thereof.

10. Describe what records were kept which show:

a) the condition of the shipment at the time of arrival;

b) what inspections were made after the shipment arrived;

c) the names and addresses of the persons who inspected the shipment after it arrived, and

d) the dates and places where the various inspections were made.

11. Set forth the name and address of the person who handled the purchase of the shipment on behalf of the Plaintiff.

12. State when the shipment was ordered from the shipper and describe the documentary evidence thereof.

13. State whether the shipper was to pack the shipment, or if not, who in fact did pack the shipment.

14. Set forth the terms and conditions of the contracts of carriage and any addendum thereto, or you may attach copies thereof to your answers.

15. With reference to Plaintiff's Complaint, state by bill of lading number, marks, etc., each unit which is claimed to have been damaged, the invoice value of the contents of each such package and the extent to which the contents of each package is claimed to have been damaged.

16. State the ultimate disposition of the cargo which was received by Plaintiff ex the vessel.

a) if the cargo was sold, state the name of the purchaser or purchasers and the amount for which the cargo or portions thereof were sold and the date of sale.

b) state any additional or extraordinary expenses, if any, incurred by Plaintiff in the sale or other disposition of the shipment in suit, giving full particulars and amounts.

c) if the cargo was not sold, state the present location of the shipment, giving such particulars as to permit inspection thereof.

17. Set forth:

a) the value F.O.B. of the cargo in suit delivered to the vessel at the time of such delivery at the port of Antwerp.

b) the price of which Plaintiff purchased the cargo.

c) whether Plaintiff or any of its subsidiaries are in the business of manufacturing the items comprising the shipment in suit.

18. State whether the cargo, which is the subject of this suit, was insured by Plaintiff or anyone acting on its behalf of interest, against loss, damage or other perils from the time it left New York, until it was delivered. If your answer is in the affirmative:

a) state who purchased the insurance.

b) state whether a claim was ever made to the insurance company under the policy of insurance.

c) if Plaintiff or anyone else obtained a recovery under the terms of this policy, state the amount recovered, the date recovery was made from the insurance company, and whether a subrogation agreement of loan receipt was given in return for the proceeds of the insurance settlement.

d) state whether the claim was declined by the insurance company, and if so, for what reason.

e) describe the terms of the insurance policy or append a copy of the insurance agreement to your answers.

19. State whether an agent or an officer of Plaintiff or its assured, inspected the cargo in suit, either before loading onto the vessel or after discharge from the vessel, and whether any reports or surveys were made at that time, if so, please set forth the name and address of such officer or agent, the date of the report and the name and address of the present custodian of such report.

20. a) State whether the shipment referred to in the Complaint remained from the time the items were packed until the time they were placed on board the vessel, setting forth the date and length of time the shipment remained in each place and the name and address of each custodian.

b) describe fully the means of transportation used to move the shipment in question, from the time the cargo shipped from the place of origin, to the time it was delivered to the vessel.

c) describe how the shipment was protected from the elements during this period.

d) state whether the shipment was exposed to rain, snow or ice from the place of origin to such time as the goods were delivered aboard the vessel. If so, please set forth full details including time, place and description of the weather conditions.

e) were lighters or other vessels used to transport the shipment at any time before delivery to the vessel? If so, give full particulars.

f) state how many days before the day of loading on board the vessel the shipment was removed from the place of origin and state whether the shipment was covered or uncovered at any time during this period, and give the dates when covered and the dates when uncovered.

21. State whether any exceptions to the condition of the shipment in suit was noted between the point of origin and delivery aboard the vessel. If so, give the particulars thereof.

22. a) if it is claimed that this Defendant, its agent or servants were at fault or negligenb with respect to the loading of said shipment, state in what respect.

b) state whether or not there was a representative of the shipper present at the time that the shipment was loaded. If so, set forth his name and address.

23. If it is claimed that this Defendant, its agent or servants were at fault, or negligent with respect to the stowage of the shipment, state in what respect or respects.

24. If it is claimed that this Defendant, its agent or servants were at fault with respect to the care of the shipment in suit, state in what respect or respects.

25. Is it claimed that the vessel was in any respect unseaworthy or negligent? If so, in what respect or respects.

26. Describe fully all shipping documents, banking documents, correspondence, communications and other written data which passed between the shipper, consignee and any other party in interest concerning the shipment in suit.

27. State what exceptions, if any, were taken at the time of delivery of the shipment in suit at destination.

28. State whether it is claimed that the shipper gave Defendant any special directions or instructions with respect to the stowage or handling of the shipment in suit. If so, set forth the content of these special

directions or instructions and how Plaintiff claims Defendant failed to comply, if it is so claimed.

29. If any customs duties were paid upon the shipment in suit, describe any documentary evidence therof.

30. If any items of the shipment were photographed after discharge from the vessel, state when, where and by whom they were photographed.

31. If any items of the shipment were photographed before loading aboard the vessel, state when, where and by whom they were photographed.

32. State what is the percentage of normal loss experienced by Plaintiff on like shipments.

33. Give the names and addresses of all persons from whom statements concerning the alleged shipment in suit have been obtained; state whether each is oral or written, and state whether each was given before or after the commencement of this suit.

34. State when, where, by whom and to whom, notice of claim on the Plaintiff's behalf was given to this Defendant; set forth the contents of such notice of claim or attach a true copy thereof.

35. State whether or not the Plaintiff or anyone on its behalf requested from this Defendant, the charterer, or anyone else, an extension of suit time; if the answer is in the affirmative, set forth the terms of any extension or

attach a true copy thereof.

Dated: New York, New York
October 17, 1975

Yours, etc.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant and
Third Party Plaintiff,

By__________________________
A Member of the Firm
One State Street Plaza
New York, N. Y. 10004

TO: BIGHAM, ENGLAR, JONES
& HOUSTON
Attorneys for Plaintiff
99 John Street
New York, N. Y. 10038

HILL, RIVKINS, CAREY,
LOESBERG & O'BRIEN
Attorneys for Third Party Defendant
96 Fulton Street
New York, N. Y. 10038

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--x

ELGIE & COMPANY,

Plaintiff,

-against-

S.S."S.A.NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant and Third-Party Plaintiffs,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant.

--x

ANSWERS TO INTERROGATORIES

74 Civ. 5112 (RO)

Plaintiff ELGIE & COMPANY answers interrogatories propounded by defendant and Third-Party plaintiff SOUTH AFRICAN MARINE CORPORATION LTD., herein under oath as follows:

1. Elgie & Company
P. O. Box 1399, 54-55 Gardner Street
Durban, South Africa.

2. $11,438.12

3. Elgie & Company
P. O. Box 1399, 54-55 Gardner Street
Durban, South Africa.

Commercial Insurance Company of Newark, N.J.
10 Park Place, Newark, New Jersey

Commercial Insurance Company of Newark, N.J.
c/o Marine Office-Appleton & Cox Corp.
80 Maiden Lane, New York, N.Y. 10038

4. Not applicable, as cargo was not loaded on vessel.

5. Not applicable, as cargo was not discharged by vessel.

6. Plaintiff purchased the cargo from Shuron Continental, Division of Textron, Inc., C.I.F. Durban

7. One (1) crate Optical Machinery, non-delivered, $11,438.12.

8. Not applicable, as claim is not for damage.

9. Not applicable.

10. Not applicable.

11. Unknown at this time.

12. Unknown at this time.

13. Unknown to plaintiff.

14. Interrogatory calls for a conclusion of law, which is to be determined by the Court.

15. Not applicable.

16. Not applicable.

17. The cargo was not delivered to the vessel at the Port of Antwerp.

18. The cargo did not leave New York.

19. No.

20. Unknown to plaintiff.
21. Unknown to plaintiff.
22. Shipment was not loaded.
23. Shipment was not stowed.
24. Shipment was not delivered.
25. Shipment was not delivered.
26. The usual commercial papers.
27. Not applicable.
28. Unknown to plaintiff.
29. Not applicable.
30. Not applicable.
31. Unknown to plaintiff
32. Not applicable.
33. None
34. By commencement of this action/
35. No.

Dated: New York, New York
October 24, 1975

Yours, etc.

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Plaintiff

By ______________________
A Member of the Firm

Office & P. O. Address:
99 John Street
New York, New York 10038

TO: HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant and
Third-Party Plaintiff

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN
Attorneys for Third Party Defendant
96 Fulton Street
New York, New York 10038

STATE OF NEW YORK (
:ss.:
COUNTY OF NEW YORK (

JOHN T. KOCHENDORFER, being duly sworn, deposes and says:

That he is associated with the firm of BIGHAM ENGLAR JONES & HOUSTON, attorneys for the plaintiff, and admitted to practice before this Court.

That he is familiar with the case and proceedings heretofore had herein, and that he has read the answers to the interrogatories, knows the contents thereof and that the same are true to the best of his knowledge and belief.

That the reason why this verification is not made by plaintiff is that said plaintiff is a foreign organization, no officer nor director of which is within the jurisdiction of this Court at this time.

John T. Kochendorfer

Sworn to before me this
27 day of October
1975.

[illegible]
Qualified [illegible]
Certificate filed in [illegible]
Commission Expires March [illegible]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

..................................x

ELGIE & COMPANY,

Plaintiff,

- against -

S.S. "S.A. NEDERBURG", her engines, boilers, etc.,

- and against -

SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendants.

..................................x

ANSWERS TO INTERROGATORIES

1. a) Yes.
   b) Yes.
   c) Yes.
   d) Mr. Joseph Castelluccio. This was done on the basis that he had received no instructions not to place any Bills of Lading on board. Therefore, as far as he was concerned, the cargo was on board the vessel as stevedore, I.T.O., had not notified him that all the original laden cargo was not on board.

2. South African Marine Corporation, Ltd. are the owners of the S.A. NEDERBURG.

3. Yes.

4. Yes, a signed dock receipt was issued.

5. See attached copy of dock receipt.

6. No.

7. The crate was loaded aboard the S.A. NEDERBURG because same was not found on dock. We do not

know the exact date, but the vessel loaded New York on March 21, 1974 and sailed March 24, 1974.

8. Two packages loaded number 4 L/T/D;
Five packages loaded number 3 L/H;
Four packages loaded number 5 hatch.

9. a) A checker for the stevedores, International Terminal Operating Co., tallied the cargo aboard the S.A. NEDERBURG. Defendant does not know his name or address.

b) Tallies are in the possession of the stevedore.

c) Tallies are not in possession of Defendant and have not been sighted by Defendant.

10. Eleven cartons only were discharged at [illegible]an from the S.A. NEDERBURG, on or about April 29, 1974.

11. Eleven cartons were discharged in good order and one crate was shortlanded.

12. Yes. Discharge tallies are prepared by the South African Railway and Harbour Administration and are in their possession.

13. Tallies are not in possession of Defendant and have not been sighted by Defendant.

14. Delivery was made to holder in due course of negotiable bill of lading No. 66 of Eleven packages on or about April 29, 1974.

15. Defendant does not know if delivery receipts were executed.

16. See Answer No. 15 above.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendants
By E. DeOrchis
A Member of the Firm
One State Street Plaza
New York, N. Y. 10004

TO: HILL, RIVKINS, CAREY, LOESBERG
& O'BRIEN
Attorneys for Third Party Defendant
96 Fulton Street
New York, N.Y. 10038

BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Plaintiff
99 John Street
New York, N.Y. 10038

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

M. E. DeORCHIS, being duly sworn, deposes and says:

He is an attorney-at-law and a member of the firm of Haight, Gardner, Poor & Havens, attorneys for Defendant herein; he has read the foregoing Answers to Interrogatories and knows the contents thereof; and that the same is true to his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

The reason this verification is made by deponent and not by Defendant, is that Defendant is a corporation, none of whose officers are presently available within the County of New York.

The sources of deponent's information and the grounds for his belief as to the matters stated in the above Answers to Interrogatories, to be alleged on information and belief are documents and records in his files.

M.E. DeORCHIS

Sworn to before me this
8th day of October, 1975.

Notary Public

GEORGE J. BIERNESSER
Notary Public, State of New York
No. 31-5316775
Qualified in New York County
Commission Expires March 30, 1976

DOCK RECEIPT AND BILL OF LADING

See opposite page

DOCK RECEIPT

SHIPPER/EXPORTER

SHURON CONTINENTAL
P.O. BOX 331
ROCHESTER, NEW YORK

DOCUMENT NO. 207

EXPORT REFERENCES
I.T.O.

197[illegible] APR 13 AM 8:03

FORWARDING AGENT - REFERENCES
COPELAND SHIPPING INC., 11321-02

POINT AND COUNTRY OF ORIGIN

CONSIGNEE

NOTIFY PARTY

DOMESTIC ROUTING/EXPORT INSTRUCTIONS
COTY TRUCKERS/ ON HAND NO. NIA.8704

PIER OR AIRPORT
XXXXXXXXXX BKLYN ARMY BASE

EXPORTING CARRIER (Vessel/Airline)
SO. AFR. [illegible] 3/15

PORT OF LOADING
NEW YORK

FOR TRANSSHIPMENT TO

AIR/SEA PORT OF DISCHARGE
DURBAN

ONWARD INLAND ROUTING

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
ELGIE & COMPANY P.O.BOX 1899 54-55 GARDINER ST DURBAN SOUTH AFRICA 403M,291M,290M, 289M,288M,287M 285M	11 1	TW.CTNS:/OPTICAL MACHINERY & CRATE / ACCESSORIES. Cole	4512 492-4810	381

DELIVERED BY:

LIGHTER
TRUCK

ARRIVED- DATE .... TIME ....

UNLOADED-DATE .... TIME ....

CHECKED BY..........

PLACED IN SHIP / ON DOCK LOCATION ....

RECEIVED THE ABOVE DESCRIBED GOODS OR PACKAGES SUBJECT TO ALL THE TERMS OF THE UNDERSIGNED'S REGULAR FORM OF DOCK RECEIPT AND BILL OF LADING WHICH SHALL CONSTITUTE THE CONTRACT UNDER WHICH THE GOODS ARE RECEIVED, COPIES OF WHICH ARE AVAILABLE FROM THE CARRIER ON REQUEST AND MAY BE INSPECTED AT ANY OF ITS OFFICES.

FOR THE MASTER

BY [illegible]
RECEIVING CLERK

DATE ....

Dock Receipt (Defect. [illegible]

802
WHSE NO. 0846

ONLY CLEAN DOCK RECEIPT ACCEPTED.

Lighter } Coty
Car } No. 7794 JH
Truck }

Started Date
Finished Date
Location

SHIPPERS ARE REQUIRED TO FILL OUT AS BELOW

MARKS	NO. of Pkge.	MEASUREMENTS						Total Cubic Ft.		Weight Gross
		Length		Breadth		Depth				
		Ft.	In.	Ft.	In.	Ft.	In.	Ft.	In.	

~~||||~~ ~~||||~~ | = 11 Fw ofn ✓
| = 1 c/s

12

Rec 12
3/13/54

94/96

Totals			

-2

SOUTH AFRICAN MARINE CORPORATION, LTD. (Carrier No. 1)

SPRINGBOK LINE, LTD. (Carrier No. 2)

SPRINGBOK SHIPPING COMPANY, LTD. (Carrier No. 3)

SHURON CONTINENTAL

B. P. CENTRE,
THIBAULT SQUARE, CAPETOWN
REPUBLIC OF SOUTH AFRICA

GENERAL AGENTS
IN U.S.A.:
SOUTH AFRICAN MARINE CORPORATION (N.Y.)
17 BATTERY PLACE
NEW YORK, N. Y. 10004

Telegrams: "Safmarco, New York"

SHORT FORM BILL OF LADING

RECEIVED the goods, or packages said to contain goods herein mentioned, in apparent good order and condition unless otherwise indicated to be transported and delivered or transhipped as herein provided.

This Short Form Bill of Lading is issued for the shipper's convenience and at its request, instead of the carrier's regular form of Bill of Lading. It shall have the effect subject to the provisions of the U.S. Carriage of Goods by Sea Act, 1936, or of the Carriage of Goods by Sea or similar Act in force in the locality where this Bill of Lading is issued.

All the terms of the carrier's regular form of Bill of Lading are incorporated herein with like force and effect as if they were written at length herein. A copy of such Bill of Lading is on file with the Federal Maritime Commission of the U.S.A., and may be obtained from the carrier, it's agents or the master.

Particular attention is called to the following provisions in the Carrier's Regular [illegible]m Bill of Lading:

The vessel, with any part of the goods on board, either before or after proceeding toward the port of discharge and for any purpose whatever that the master may consider advisable, may stay in port, adjust compasses, dock, go on ways or to repair yards, shift berths, lie on the bottom in berth, move from place to place in any port, take fuel or stores, load or discharge cargo, sail without pilots, tow and assist vessels or be towed, save life, property of the carrier or others, proceed via the Panama Canal and/or Straits of Magellan and/or Cape Horn and/or Suez Canal and/or Cape of Good Hope or otherwise by any route or through any waters whatever. The vessel may omit calling at any port, whether scheduled or not, may deviate from, or change the advertised, usual, geographical or intended route at any stage of the voyage and may proceed beyond or in a contrary direction to or outside the usual route to the port of discharge and may proceed to and stay at and load or discharge at any place whatever, as inducements may offer, backwards or forwards, once or oftener, and may load, carry or discharge cargo at, for or between intermediate or other ports, whether on this voyage or a preceding or subsequent voyage, even though two or more of such voyages may overlap. Any such procedure shall be considered within the voyage herein intended as fully as if specifically described herein.

Without limitation of any other provision herein, in any situation whatever or wherever occuring and whether existing or anticipated before commencement of, or during the voyage, which, in the judgment of the carrier is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to, or loss of the ship or any part of the cargo or to make it unsafe, imprudent or unlawful for any reason to commence or continue the voyage, or to give rise to delay or difficulty in arriving, entering, discharging at or leaving the port of discharge or the usual or intended place of discharge in such port, the carrier may decline to load, or before or after loading or before the commencement of the voyage may require the shipper or other person entitled thereto, to take delivery of the goods at port of shipment and on their failure to do so, may warehouse the goods at their risk and expense; or the carrier, whether or not proceeding toward or attempting to enter the port of discharge, may proceed by any route or return directly or indirectly to or stop at such other port or place whatever as the carrier may consider safe or advisable under the circumstances, once or oftener, backwards or forwards in any order and discharge the goods at any place he may select there, or the carrier may retain the [illegible]go on board until a return trip or until such time as the carrier thinks advisable and discharge the goods at any place wha[illegible] herein provided, or the carrier may discharge and forward the goods by any means whatever, all at the risk and expe[illegible] goods. The carrier is not required to give notice of discharge or forwarding. Whenever the goods are discharged from the ship they shall be at their own risk and expense. Such discharge shall constitute complete delivery and performance under this contract and the carrier shall be free from any further responsibility. The carrier shall be entitled to a reasonable extra compensation for any services in connection with the foregoing above the agreed freight.

Full freight to port of discharge named herein shall be considered completely earned on receipt of the goods by the carrier, whether the freight be stated or intended to be prepaid or to be collected at destination; and the carrier shall be entitled absolutely to all freight and all charges due hereunder, whether actually paid or not, and to receive and retain them under all circumstances whatever, ship and/or cargo lost or not lost. Freight is payable to ship's agent by transferable currency. Rate of exchange for payment of freight will be the applicable Bank T/T selling rate on New York prevailing on date of payment or on date of vessel's arrival at the port of discharge whichever date is earlier.

All agreements or freight engagements for shipment of goods are superseded by this Bill of Lading and all its terms, whether written, typed, stamped or printed, or incorporated by reference are agreed by the shipper to be binding and to govern the relations, whatever they may be, between those included in the words "shipper" and "carrier" as defined in the carrier's regular form of Bill of Lading. One signed Bill of Lading duly endorsed, will be surrendered, if requested, to the agent of the vessel at port of discharge in exchange for delivery order.

(CONTINUED ON REVERSE SIDE)

SOUTH AFRIC[illegible] MARINE CORPORATION ([illegible]Y.), as Agents

HIPPER/EXPORTER

S[illegible]
40 [illegible] ST.
[illegible]

DOCUMENT NO.

EXPORT REFERENCES

FORWARDING AGENT, REFERENCES

[illegible] 11321-02

ONSIGNEE

ORDER OF SHIPPER

POINT AND COUNTRY OF ORIGIN

NOTIFY PARTY

ELGIE & COMPANY
P.O. BOX 1099
DURBAN

DOMESTIC ROUTING/EXPORT INSTRUCTIONS

RECEIVED ON [illegible]

MAR 22 1974

PIER

EXPORTING CARRIER (Vessel and Flag)

S.A. NEDERBURG

PORT OF LOADING

ONWARD INLAND ROUTING

PER

PORT OF DISCHARGE

FOR TRANSSHIPMENT TO

Spaces above are for shippers' memoranda—not part of bill of lading

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
ELGIE & COMPANY PO BOX 1099 54-55 GARDINER ST DURBAN SOUTH AFRICA	11 1	W.CTNS:) OPTICAL MACHINERY & CRATE:) ACCESSORIES.	4512	[illegible]
103M, 291M, 29[illegible] 28[illegible]M, 2COM, 237[illegible] 266M.		L/C FB 1395	Freight Prepaid	
		"FREIGHT PREPAID" ON BOARD		
		[illegible] SOUTH AFRICA		

[illegible]

*as identified on the reverse side and referred to herein as "the carrier." Neither South African Marine Corporation (N.Y.), nor any other person, firm or corporation other than the carrier, whether or not its name is stated elsewhere herein, assumes any of the duties, responsibilities and liabilities stated herein as being those of the carrier.

Ship operated for account of:→
(See on reverse side)

FREIGHT:

............@............ per 40 cu. ft. $
............@............ per 40 cu. ft. $
............@............ per 2240 lbs. $
............@............ per 2240 lbs. $
............@............ $
............@............ $
TOTAL FREIGHT $

In witness whereof 3 (Three) Bills of Lading, all of the same tenor have been signed, one of which being accomplished the others to stand void.

B/L No.	Month	Day	Year. 19....

DATED AT PORT OF LOADING SHOWN ABOVE

FOR AND ON BEHALF OF MASTER

By____________________
AS AGENTS ONLY

J 88a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELGIE & COMPANY,

Plaintiff,

- against -

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant and Third-Party Plaintiffs,

- against -

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

Third-Party Defendant.

Index No.:
75 Civ. 5112(RO)

REQUEST FOR ADMISSION OF FACTS AND GENUINESS OF DOCUMENTS

COPY RECEIVED
DEC 8 - 1975
Bigham, Englar, Jones & Houston

Third-party defendant, INTERNATIONAL TERMINAL OPERATING COMPANY, INC., requests both defendant, SOUTH AFRICAN MARINE CORPORATION, LTD., and plaintiff, ELGIE & COMPANY, within 30 days after service of this request to admit, for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. That the document attached hereto and marked "Exhibit A" is a genuine copy of the original dock receipt covering the shipment in question.

2. That "Exhibit A" designates the original loading vessel as the "MORGENSTER".

3. That the shipment described in "Exhibit A" was received by the third-party defendant, International Terminal Operating Co., Inc., on March 13, 1974.

4. That the typed portion of "Exhibit A" was prepared by the employees of the defendant, South African Marine Corp., Ltd.,

5. That subsequent to the preparation of "Exhibit A" the defendant, South African Marine Corp., Ltd., changed the vessel designated to carry the shipment from the "Morgenster" to the "S.A. Nederburg".

6. That the reason for the change of vessel, i.e. from the "Morgenster" to the "S.A. Nederburg" resulted from lack of space for stowage of the consignment aboard the "Morgenster".

7. That the document attached hereto and marked "Exhibit B" is a genuine copy of the bill of lading covering the shipment in question.

8. That "Exhibit B" was issued by the employees of the defendant, South African Marine Corp., Ltd.

9. That "Exhibit B" is a "clean on board" bill of lading.

10. That "Exhibit B" describes 12 packages which were to be loaded aboard the "S.A. Nederburg" for the voyage in question.

11. That "Exhibit B" states that the packages described therein were "received on board" on March 22, 1974.

12. That in fact only 11 of the packages described in "Exhibit B" were loaded aboard the "S.A. Nederburg" on the voyage in question.

13. That the consignee or their agents received only 11 packages ex the "S.A. Nederburg" at Durban on the voyage in question.

14. That "Exhibit A" identifies the dock receipt number as #207 for the shipment in question.

15. That "Exhibit C" shows 1 piece of cargo under dock receipt #207.

16. That the one piece described in "Exhibit C" under dock receipt #207 was part of the consignment more fully described in "Exhibit B".

17. That the one piece described in "Exhibit C" under dock receipt #207 was loaded aboard the S.S. MORGENSTER on or about March 15, 1974.

18. That the plaintiff's, ELGIE & COMPANY, loss and/or damages are confined to one package, crate, etc. identified in "Exhibit B".

Dated: New York, New York
December 5, 1975

HILL RIVKINS CAREY LOESBERG & O'BRIEN
Attorneys for Third-Party Defendant,

By: /s/

ROBERT E. DALEY
Attorney of Record
96 Fulton Street
New York, New York 10038

TO:

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Plaintiff
99 John Street
New York, New York 10038

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant and
Third-Party Plaintiff
One State Street Plaza
New York, New York 10004

EXHIBIT A, Annexed to Request for Admission of Facts

See opposite page

DOCK RECEIPT

PPER/[illegible]

SHURCN CONTINENTAL
P.O. BOX 331
ROCHESTER, NEW YORK

DOCUMENT NO. 707

EXPORT REFERENCES

NSIGNEE

FORWARDING AGENT - REFERENCES
COPELAND SHIPPING INC., 11321-02

POINT AND COUNTRY OF ORIGIN

DOMESTIC ROUTING/EXPORT INSTRUCTIONS
COTY TRUCKING/ [illegible] NO. MIA.8704

OTIFY PARTY

IER OR AIRPORT
[illegible] ARMY BASE

EXPORTING CARRIER (Vessel/Airline)
.FR. NORGENSTERN 3/15

PORT OF LOADING
NEW YORK

FOR TRANSSHIPMENT TO

AIR/SEA PORT OF DISCHARGE
[illegible]

ONWARD INLAND ROUTING

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
BIE & COMPANY O.BOX 1899 -55 GARDINER ST RBAN UTH AFRICA 311,2914,2904, 74,2904,2874 5H	11 1	TW.CTNS./OPTICAL MACHINERY & CRATE / ACCESSORIES.	5512	381

DELIVERED BY:

LIGHTER
TRUCK

ARRIVED- DATE .... TIME ....

UNLOADED-DATE .... TIME ....

CHECKED BY ....

PLACED IN SHIP ON DOCK LOCATION ....

WHSE NO. 0840

RECEIVED THE ABOVE DESCRIBED GOODS OR PACKAGES SUBJECT TO ALL THE TERMS OF THE UNDERSIGNED'S REGULAR FORM OF DOCK RECEIPT AND BILL OF LADING WHICH SHALL CONSTITUTE THE CONTRACT UNDER WHICH THE GOODS ARE RECEIVED, COPIES OF WHICH ARE AVAILABLE FROM THE CARRIER ON REQUEST AND MAY BE INSPECTED AT ANY OF ITS OFFICES.

✓

FOR THE MASTER

BY ....
RECEIVING CLERK

DATE ....

Exh A-1 (Request for Admission)

ONLY CLEAN DOCK RECEIPT ACCEPTED.

Lighter / Car / Truck } No. Coty 9894 JH

Started Date
Finished Date I.T.O.
Location

1974 MAR 13 AM 8 03

SHIPPERS ARE REQUIRED TO FILL OUT AS BELOW

MARKS	NO. of Pkgs.	MEASUREMENTS Length Ft.	Length In.	Breadth Ft.	Breadth In.	Depth Ft.	Depth In.	Total Cubic Ft. Ft.	Total Cubic Ft. In.	Weight Gross
		𝍸 𝍸 I		=		11	Tlws	ctns		
		I		=		1	c/s			
					12					

94/96

Ref (12)

3/13/74

Totals

A-2

J 93a

EXHIBIT B, Annexed to Request for Admission of Facts

See opposite page

SOUTH AFRIC[illegible] MARINE CORPORATION ([illegible] Y.), as Agents

HIPPER/EXPORTER

SHARON CONTINENTAL
40 HUMBOLDT ST.
ROCHESTER, NEW YORK

DOCUMENT NO.

EXPORT REFERENCES

ONSIGNEE

ORDER OF SHIPPER

FORWARDING AGENT, REFERENCES

COPELAND SHIPPING INC. 11321-02
SUBSIDIARY: JET AIR FREIGHT — FMC #[illegible] — FMC #[illegible]
[illegible], N.Y. 11[illegible] (212) [illegible]

POINT AND COUNTRY OF ORIGIN

OTIFY PARTY

ELSIE & COMPANY
P.O. BOX 1899
DURBAN

DOMESTIC ROUTING/EXPORT INSTRUCTIONS

RECEIVED ON BOARD

MAR 22 1974

SOUTH AFRICAN
MARINE CORP. N.Y.
PER

IER

EXPORTING CARRIER (Vessel and Flag)

S.A. NEDERBURG

PORT OF LOADING

ONWARD INLAND ROUTING

PORT OF DISCHARGE

DURBAN

FOR TRANSSHIPMENT TO

Spaces above are for shippers' memoranda — not part of bill of lading

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
ELSIE & COMPANY PO BOX 1899 54-55 GARDINER ST DURBAN SOUTH AFRICA	11 1	TW.CTNS:) OPTICAL MACHINERY & CRATE:) ACCESSORIES.	4512	381
403M, 291M, 290M 289M, 288M, 287M 286M,		L/C# FB 1396		
		"FREIGHT PREPAID" ON BOARD	Freight Prepaid (Date) South African Marine Corp. (N.Y.)	
		G-DEST. SOUTH AFRICA		

RECEIVED
2 APR 1974

These Commodities Licensed by the U.S. for Ultimate Destination SOUTH AFRICA Diversion Contrary to U.S. Law Prohibited.

*as identified on the reverse side and referred to herein as "the carrier." Neither South African Marine Corporation (N.Y.), nor any other person, firm or corporation other than the carrier, whether or not its name is stated elsewhere herein, assumes any of the duties, responsibilities and liabilities stated herein as being those of the carrier.

Ship operated for account of:→ CARRIER NO. 1
(See on reverse side)

FREIGHT:

.... @	per 40 cu. ft.	$	
.... @	per 40 cu. ft.	$	
.... @	per 2240 lbs.	$	
.... @	per 2240 lbs.	$	
.... @		$	
.... @		$	
	TOTAL FREIGHT	$	

In witness whereof 3 (Three) Bills of Lading, all of the same tenor have been signed, one of which being accomplished the others to stand void.

B/L No.	Month	Day	Year 19

DATED AT PORT OF LOADING SHOWN ABOVE

FOR AND ON BEHALF OF MASTER

Exh. B (Request for Admission) -1

BY
AS AGENTS ONLY

EXHIBIT C, Annexed to Request for Admission of Facts

See opposite page

SOUTH AFRICAN MARINE CORPORATION, LTD. (Carrier No. 1)
SPRINGBOK LINE, LTD. (Carrier No. 2)
SPRINGBOK SHIPPING COMPANY, LTD. (Carrier No. 3)

SHURON CONTINENTAL

B. P. CENTRE,
THIBAULT SQUARE, CAPETOWN
REPUBLIC OF SOUTH AFRICA

GENERAL AGENTS
IN U.S.A.:
SOUTH AFRICAN MARINE CORPORATION (N.Y.)
17 BATTERY PLACE
NEW YORK, N. Y. 10004

Telegrams: "Safmarco, New York"

SHORT FORM BILL OF LADING

RECEIVED the goods, or packages said to contain goods herein mentioned, in apparent good order and condition unless otherwise indicated to be transported and delivered or transhipped as herein provided.

This Short Form Bill of Lading is issued for the shipper's convenience and at its request, instead of the carrier's regular form of Bill of Lading. It shall have the effect subject to the provisions of the U.S. Carriage of Goods by Sea Act, 1936, or of the Carriage of Goods by Sea or similar Act in force in the locality where this Bill of Lading is issued.

All the terms of the carrier's regular form of Bill of Lading are incorporated herein with like force and effect as if they were written at length herein. A copy of such Bill of Lading is on file with the Federal Maritime Commission of the U.S.A., and may be obtained from the carrier, it's agents or the master.

Particular attention is called to the following provisions in the Carrier's Regular Form Bill of Lading:

The vessel, with any part of the goods on board, either before or after proceeding toward the port of discharge and for any purpose whatever that the master may consider advisable, may stay in port, adjust compasses, dock, go on ways or to repair yards, shift berths, lie on the bottom in berth, move from place to place in any port, take fuel or stores, load or discharge cargo, sail without pilots, tow and assist vessels or be towed, save life, property of the carrier or others, proceed via the Panama Canal and/or Straits of Magellan and/or Cape Horn and/or Suez Canal and/or Cape of Good Hope or otherwise by any route or through any waters whatever. The vessel may omit calling at any port, whether scheduled or not, may deviate from, or change the advertised, usual, geographical or intended route at any stage of the voyage and may proceed beyond or in a contrary direction to or outside the usual route to the port of discharge and may proceed to and stay at and load or discharge at any place whatever, as inducements may offer, backwards or forwards, once or oftener, and may load, carry or discharge cargo at, for or between intermediate or other ports, whether on this voyage or a preceding or subsequent voyage, even though two or more of such voyages may overlap. Any such procedure shall be considered within the voyage herein intended as fully as if specifically described herein.

Without limitation of any other provision herein, in any situation whatever or wherever occuring and whether existing or anticipated before commencement of, or during the voyage, which, in the judgment of the carrier is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to, or loss of the ship or any part of the cargo or to make it unsafe, imprudent or unlawful for any reason to commence or continue the voyage, or to give rise to delay or difficulty in arriving, entering, discharging at or leaving the port of discharge or the usual or intended place of discharge in such port, the carrier may decline to load, or before or after loading or before the commencement of the voyage may require the shipper or other person entitled thereto, to take delivery of the goods at port of shipment and on their failure to do so, may warehouse the goods at their risk and expense; or the carrier, whether or not proceeding toward or attempting to enter the port of discharge, may proceed by any route or return directly or indirectly to or stay at such other port or place whatever as the carrier may consider safe or advisable under the circumstances, once or oftener, backwards or forwards in any order and discharge the goods at any place he may select there, or the carrier may retain the cargo on board until a return trip or until such time as the carrier thinks advisable and discharge the goods at any place whatever as herein provided, or the carrier may discharge and forward the goods by any means whatever, all at the risk and expense of the goods. The carrier is not required to give notice of discharge or forwarding. Whenever the goods are discharged from the ship they shall be at their own risk and expense. Such discharge shall constitute complete delivery and performance under this contract and the carrier shall be free from any further responsibility. The carrier shall be entitled to a reasonable extra compensation for any services in connection with the foregoing above the agreed freight.

Full freight to port of discharge named herein shall be considered completely earned on receipt of the goods by the carrier, whether the freight be stated or intended to be prepaid or to be collected at destination; and the carrier shall be entitled absolutely to all freight and all charges due hereunder, whether actually paid or not, and to receive and retain them under all circumstances whatever, ship and/or cargo lost or not lost. Freight is payable to ship's agent by transferable currency. Rate of exchange for payment of freight, will be the applicable Bank T/T selling rate on New York prevailing on date of payment or on date of vessel's arrival at the port of discharge whichever date is earlier.

All agreements or freight engagements for shipment of goods are superseded by this Bill of Lading and all its terms, whether written, typed, stamped or printed, or incorporated by reference are agreed by the shipper to be binding and to govern the relations, whatever they may be, between those included in the words "shipper" and "carrier" as defined in the carrier's regular form of Bill of Lading. One signed Bill of Lading duly endorsed, will be surrendered, if requested, to the agent of the vessel at port of discharge in exchange for delivery order.

(CONTINUED ON REVERSE SIDE)

SOUTH AFRICAN MARINE CORPORATION (N.Y.), as Agents

SHIPPER/EXPORTER

SHARON CONTINENTAL
40 HUMBOLDT ST.
ROCHESTER, NEW YORK

DOCUMENT NO.

EXPORT REFERENCES

FORWARDING AGENT, REFERENCES

COPELAND SHIPPING INC. 11321-02
SUBSIDIARY: JET AIR FREIGHT — FMC [illegible] — FMC [illegible]

CONSIGNEE

ORDER OF SHIPPER

POINT AND COUNTRY OF ORIGIN [illegible] N.Y. [illegible] (212) [illegible]

NOTIFY PARTY

ELGIE & COMPANY
P.O. BOX 1899
DURBAN

DOMESTIC ROUTING/EXPORT INSTRUCTIONS

RECEIVED ON BOARD

MAR 22 1974

SOUTH AFRICAN MARINE CORP. N.Y.
PER

PIER

EXPORTING CARRIER (Vessel and Flag)

S.A. NEDERBURG

PORT OF LOADING

ONWARD INLAND ROUTING

PORT OF DISCHARGE

DURBAN

FOR TRANSSHIPMENT TO

Spaces above are for shippers' memoranda—not part of bill of lading

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
ELGIE & COMPANY PO BOX 1899 54-55 GARDINER ST DURBAN SOUTH AFRICA	11 1	TW.CTNS: } OPTICAL MACHINERY & CRATE: } ACCESSORIES.	4512	381
403M, 291M, 290M 289M, 288M, 287M 286M,		L/C# FB 1396		
		"FREIGHT PREPAID" ON BOARD	Freight Prepaid (Date) South African Marine Corp. (N.Y.)	
		G-DEST. SOUTH AFRICA		

These Commodities licensed by the U. S. for Ultimate Destination SOUTH AFRICA
Diversion Contrary to U. S. Law Prohibited.

*as identified on the reverse side and referred to herein as "the carrier." Neither South African Marine Corporation (N.Y.), nor any other person, firm or corporation other than the carrier, whether or not its name is stated elsewhere herein, assumes any of the duties, responsibilities and liabilities stated herein as being those of the carrier.

Ship operated for account of:→ CARRIER NO. 1
(See on reverse side)

FREIGHT:			
.... @	per 40 cu. ft.	$	
.... @	per 40 cu. ft.	$	
.... @	per 2240 lbs.	$	
.... @	per 2240 lbs.	$	
.... @		$	
.... @		$	
	TOTAL FREIGHT	$	

In witness whereof 3 (Three) Bills of Lading, all of the same tenor have been signed, one of which being accomplished the others to stand void.

B/L No. [illegible]

Month [illegible] Day [illegible] Year 19[illegible]

DATED AT PORT OF LOADING SHOWN ABOVE

FOR AND ON BEHALF OF MASTER

Exh. B-1 (Request for Admission)

By ______________________
AS AGENTS ONLY

Magee

SHIP MORGENSTER DATE 3/15/74

HATCH #6 HATCH STOW UT/DECK FWD
WINGS & Sq.

PORT DURBAN

OCT 8 1975

D/L	AMT	DESCRIPTION	WGT	
78/30	30	4-2-2 2-2-2-2-4-2-2-2-4		
444/2	2	2		
1/29773	786	180 (820) - 69 - 120 - 250 - 195 [illegible]	7 Ton	
434/16	1			
36/37	1	Elect Motor 8650#	4 Ton	
230/13	13	2-2-2-2-2-3-		
286/29	28	4-2-4-4-4-4-6 [illegible]	7 Ton	
207/12	1	1- * Parts		
211/16	16	6-8-2		
296/1	1			
301/1	1			
283/1	1			
443/81	81			
429/340	340	96-96-52-96		
406/6	6			
443/81	28	28-		
200/212	212	99-36-43-34-	1 Ton	
240/51	19	19- Empty Capsules-		
154/1190	481	78-79-51 Glassware 85-	5 Ton	

CHECKER

Exh. C (Request for Admission)

J 97a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

---x

ELGIE & COMPANY,

Plaintiff,

-against-

S.S."S.A.NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant and
Third-Party Plaintiffs,

-against-

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

Third-Party Defendant

---x

Index No.:
75 Civ. 5112 (RO)

ANSWERS TO THIRD-PARTY DEFENDANT's NOTICE TO ADMIT

SIRS:

Pursuant to the Notice to Admit of Third-Party Defendant INTERNATIONAL TERMINAL OPERATING COMPANY, INC. dated December 5, 1975, the following are the Plaintiff's, ELGIE & COMPANY, answers:

1. Plaintiff is neither in a position to admit nor deny the genuineness of the copy attached as Exhibit "A". In fact, at the deposition of International Terminal Operating Company,Inc. on October 14, 1975, plaintiff's attorney requested the original dock receipt, as two different photocopies were presented. Neither plaintiff nor third-party defendant were able to produce the original dock receipt.

2. Plaintiff can neither admit nor deny for the reason set forth in No. 1.

3. Plaintiff can neither admit nor deny for the reason set forth in No. 1. However, plaintiff admits that the cargo was received by defendant South African Marine Corporation, Ltd., and if International Terminal Operating Company, Inc. was acting as their agent, they would have to receive the shipment in that capacity.

4. Plaintiff can neither admit nor deny, as the plaintiff was not present when the dock receipt was prepared; and further, plaintiff was unaware as to what the dock receipt contained for the reason set forth in No. 1.

5. Plaintiff can neither admit nor deny, as the plaintiff was not present when the dock receipt was prepared, for the reason set forth in No. 4.

6. Plaintiff can neither admit nor deny, as the plaintiff was not present when the dock receipt was prepared, for the reason set forth in No. 4.

7. Admitted.

8. Plaintiff admits that the bill of lading attached as Exhibit "B" was issued by the S.S. "S.A.NEDERBURG" and defendant South African Marine Corporation, Ltd.

9. Admitted.

10. Admitted.

11. Admitted.

12. Plaintiff can neither admit nor deny what was loaded on board the S.S."S.A.NEDERBURG", as plaintiff was not present at the loading. Plaintiff has alleged that only eleven (11) of the packages described in Exhibit "B" were loaded on the S.S."S.A.NEDERBURG" from information obtained through other documents and investigation.

13. Admitted.

14. Plaintiff can neither admit nor deny for the reasons set forth in Answer No. 1.

15. Plaintiff can neither admit nor deny, as the original of Exhibit "C" was not prepared by plaintiff or its agents or ever in its possession. It has not been identified, and in fact at the deposition of International Terminal Operating Company,Inc. on October 14, 1975, when the document was presented, it was never properly identified, nor was it explained where the original came from.

16. Plaintiff can neither admit nor deny for the reason set forth in No. 15.

17. Plaintiff can neither admit nor deny as plaintiff was not present when any cargo was loaded on board the S. S. "S. A. NEDERBURG".

18. Plaintiff's loss and/or damage is confined to the loss set forth in the complaint, which was described on the bill of lading, Exhibit "B" as one (1) crate.

Dated: New York, New York
December 9, 1975.

Yours, etc.

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Plaintiff
ELGIE & COMPANY

By ROBERT J. WILLIAMS
A Member of the Firm

Office and P. O. Address:
99 John Street
New York, New York 10038
Telephone: 732-4646

TO: HILL RIVKINS CAREY
LOESBERG & O'BRIEN
Attorneys for Third-Party
Defendant
96 Fulton Street
New York, New York 10038

HAIGHT GARDNER POOR & HAVENS
Attorneys for Defendant and
Third-Party Plaintiff
One State Street Plaza
New York, New York 10004

STATE OF NEW YORK (
: ss.:
COUNTY OF NEW YORK(

JOHN T. KOCHENDORFER, being duly sworn, deposes and says:

I am an associate of the firm of BIGHAM, ENGLAR, JONES & HOUSTON, attorneys for the plaintiff in this action.

I have read the foregoing answers to Third-Party Defendant's Notice to Admit, know the contents thereof, and the same are true to the best of my knowledge, information and belief.

The sources of my information and the grounds of my belief are documents in the possession of my firm.

The reason this verification is made by me and not by ELGIE & COMPANY is that ELGIE & COMPANY is a corporation, no officer of which is now within this District or within the City of New York.

S/ John T. Kochendorfer

Sworn to before me this
9th day of December
1 9 7 5.

JAMES F. HART

JAMES F. HART
NOTARY PUBLIC, State of New York
No. 31-1692800
Qualified in New York County

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

..............................x

ELGIE & COMPANY,

Plaintiff,

- against -

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant and Third Party Plaintiffs,

- against -

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

Third Party Defendant.

..............................x

ANSWER TO THIRD PARTY DEFENDANT'S NOTICE TO ADMIT

75 Civ. 5112 (RO)

COPY RECEIVED
JAN 9 - 1976
Bigham, Englar, Jones & Houston

SIRS:

Pursuant to the Notice to Admit of Third Party Defendant INTERNATIONAL TERMINAL OPERATING COMPANY, INC., dated December 5, 1975, the following are SOUTH AFRICAN MARINE CORPORATION, LTD.'S Answers:

1. Defendant is neither in a position to admit nor deny the genuineness of the copy attached as Exhibit "A"., as two (2) different photocopies of the dock receipt in question were produced at the deposition of International Terminal Operating Company, Inc. on October 14, 1975.

2. Defendant can neither admit or deny for the reason set forth in No. 1 above.

3. Defendant can neither admit or deny for the reason set forth in No. 1 above.

4. Defendant can neither admit or deny, as Defendant was not present when the dock receipt was prepared. However, it would appear from the dock receipt that it was prepared by Copeland Shipping, Inc., the shipper's forwarding agent.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admits that Exhibit "B" was issued by the employees of the Defendant, South African Marine Corporation (New York).

9. Admitted.

10. Admitted.

11. Admitted.

12. That in fact only 11 of the packages described in Exhibit "B" were loaded aboard the S.A. NEDERBURG on the voyage in question.

13. Defendant can neither admit nor deny what was received at Durban from the S.A. NEDERBURG as the discharging and receiving records as yet, have not been located.

14. Admitted.

15. Defendant can neither admit nor deny for

reason as the original of Exhibit "C" was not prepared by Defendant or ever in its possession.

16. Defendant can neither admit nor deny for reason as set forth in No. 15 above.

17. Defendant can neither admit nor deny for reason as set forth in No. 15 above.

18. Admitted.

Dated: New York, New York
January 7, 1976.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant and
Third Party Plaintiff

By_________________________
A Member of the Firm
One State Street Plaza
New York, N. Y. 10004

TO: BIGHAM, ENGLAR, JONES
& HOUSTON
Attorneys for Plaintiff
99 John Street
New York, New York 10038

HILL, RIVKINS, CAREY,
LOESBERG & O'BRIEN
Attorneys for Third Party
Defendant
96 Fulton Street
New York, New York 10038

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

M. E. DeORCHIS, being duly sworn, deposes and says:

He is an attorney-at-law and a member of the firm of Haight, Gardner, Poor & Havens, attorneys for Defendant and Third Party Plaintiff herein; he has read the foregoing Answers to Third Party Defendant's Notice To Admit and knows the contents thereof; and that the same is true to his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

The reason this verification is made by deponent and not by Defendant and Third Party Plaintiff, is that Defendant and Third Party Plaintiff is a corporation, none of whose officers are presently available within the County of New York.

The sources of deponent's information and the grounds for his belief as to the matters stated in the above Answers to Third Party Defendant's Notice To Admit, to be alleged on information and belief are documents and records in his files.

s/ M. E. DeOrchis
M. E. DeORCHIS

Sworn to before me
this 7th day of January, 1976.

Notary Public

MARGUERITE E. ZAMBITO

gtlm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

ELGIE & COMPANY, :

Plaintiff, :

-against- :

S.S. "S.A. NEDERBURG," her engines, boilers, etc. and SOUTH AFRICAN MARINE CORPORATION, LTD., :

Defendant. :

-----------------------------------x 74 Civil 5112

S.S. "S.A. NEDERBURG," her engines, boilers, etc. and SOUTH AFRICAN MARINE CORPORATION, LTD., :

Third Party Plaintiff, :

-against- :

INTERNATIONAL TERMINAL OPERATING CO., INC., :

Third Party Defendant. :

-----------------------------------x

March 19, 1976
10 a.m.

Before:

GERALD L. GOETTEL,

Magistrate

APPEARANCES:

BIGHAM ENGLAR JONES & HOUSTON, ESQS.
Attorneys for Plaintiff
99 John Street
New York, New York
By: JOHN KOCHENDORFER, ESQ., of Counsel
-and-
ALEXANDER PELTZ, ESQ., of Counsel

HAIGHT GARDNER POOR & HAVENS, ESQS.
Attorneys for Defendant and Third Party Plaintiff
One State Street
New York, New York
By: M. E. De ORCHIS, ESQ., of Counsel
-and-
B. D. STARER, ESQ., of Counsel

HILL RIVKINS CAREY LOESBERG & O'BRIEN, ESQS.
Attorneys for Third Party Defendant
96 Fulton Street
New York, New York
By: ROBERT E. DALEY, ESQ., of Counsel
-and-
MARTIN B. MULROY, ESQ., of Counsel

* * *

THE MAGISTRATE: Gentlemen, I have read your findings of fact and conclusions of law and the memorandum of law submitted on behalf of the defendant.

I feel I am familiar with the issues in the litigation and that no opening statements will be necessary.

Do any of you take violent disagreement

with that?

All right. Then we will have the plaintiff present its first witness.

MR. KOCHENDORFER: Your Honor, John Kochendorfer from Bigham, Englar for the plaintiff.

Before I put my first witness on, I would just like to put in some items which are in the pleadings.

Defendant has admitted in Answer 2 to the Complaint that it is a foreign corporation with an office and place of business in South Africa, having an agent in New York, and they admit in paragraph 3 that they were the owner and operator of the S.A. NEDERBURG and operated it between New York and Durban in the carriage of goods by water for hire.

In paragraph 5 of the Answer, the defendant admits that on or about March 15, 1974, Shuron/Continental delivered one crate said to contain optical machineries and accessories to the defendant South African Marine Corporation in apparent good order and condition for transportation on the NEDERBURG to South Africa in consideration of an agreed freight and pursuant to the terms of a bill of lading issued by South African Marine.

gtlm

In paragraph 6 of their Complaint, they admit that the NEDERBURG arrived in Durban on or about April 29, 1974 and failed to deliver the one crate of the subject shipment.

That is in the Answers to the Complaint.

Then subsequently certain interrogatories were served on the defendant by plaintiff.

In paragraph 1 or interrogatory Number 1, they admit the bill of lading. And I would like at this time to offer the bill of lading into evidence.

MR. DALEY: Your Honor, at this time I would like to raise an objection to the admission of the bill of lading into evidence, not in relation to a contract between the defendants and the plaintiff herein, but as to binding the third party defendant in any way. They are not a party to that contract.

MR. DE ORCHIS: For the record, then I assume the third party defendant is not claiming any of the benefits under the contractual clauses of the bill of lading.

MR. DALEY: Your Honor, we did not issue the bill of lading. We, by contract with the steamship carrier, have the benefit of certain parts of the bill of lading, but we are not bound by the notations or anything contained on that bill of lading.

THE MAGISTRATE: Is there any cause of action stated against the third party defendant by the plaintiff?

MR. KOCHENDORFER: I have not stated a cause of action against the third party defendant.

THE MAGISTRATE: At the moment you are only offering the exhibit as against the defendant?

MR. KOCHENDORFER: Against the defendant South African Marine Corporation.

THE MAGISTRATE: All right. So this other side issue doesn't develop at the moment.

Is there any objection to the admission of the bill of lading by the defendant?

MR. DE ORCHIS: No, I have no objection to the bill of lading.

We haven't seen this particular -- oh, yes, we have.

I have no objection to the bill of lading.

I do want to point out, though, in impleading the third party defendant, we also impleaded him as a party who might be directly responsible to the plaintiff.

gtlm

MR. DALEY: Your Honor, if I may, in the third party Complaint the defendant South African Marine did not request judgment over in favor of the plaintiff, it was straight indemnification, your Honor.

THE MAGISTRATE: All right. Let us move on with this exhibit.

If there is no objection to it, it may be offered as Exhibit 1.

MR. DE ORCHIS: No objection.

xxx (Bill of lading received and marked Plaintiff's Exhibit 1 in evidence.)

MR. KOCHENDORFER: Your Honor, in Answer 3 to the interrogatories, the defendant admits that on or about March 15th it received the shipment of 11 cartons and one crate of optical machinery and accessories evidenced by the bill of lading which was offered as Exhibit 1.

In Answer 8 to the interrogatories, the defendant accounts for the stowage of only 11 of the 12 items set forth on the bill of lading.

MR. DALEY: Your Honor, if I may, in plaintiff's answer to that or the defendant's answer to that interrogatory Number 8, he lists 12.

He says 4, 3 and 5.

MR. DE ORCHIS: No. Read the first paragraph. Those are the ha[illegible] numbers.

MR. DALEY: Excuse [illegible], your Honor, I made a mistake.

I withdraw the objection.

MR. KOCHENDORFER: It is agreed it was 11?

MR. DALEY: It is agreed that the defendant answered that there was 11 on board the NEDERBURG.

MR. KOCHENDORFER: In answer to interrogatory Number 10, defendant admits that only 11 cartons were discharged at Durban from the S.A. NEDERBURG on or about April 29, 1974.

THE MAGISTRATE: Mr. Kochendorfer, the bill of lading speaks of 11 cartons and one crate.

MR. KOCHENDORFER: Yes.

THE MAGISTRATE: Can we then say they are speaking of the 11 cartons and not the one crate?

MR. KOCHENDORFER: Yes.

THE MAGISTRATE: Or they are speaking about 11 out of 12 without distinguishing?

MR. KOCHENDORFER: They are speaking of 11 cartons.

In answer Number 11 to the interrogatories,

gtlm

the defendant admits one crate was short-landed.

In answer to interrogatory Number 14, defendant states that delivery was made to holder in due course of negotiable bill of lading Number 66, which is in evidence, of 11 cartons.

For the next item, I have the deposition which was taken of the shipper, Shuron/Continental, in Rochester.

If your Honor please, I would like to put the entire deposition into evidence and then bring out certain portions of it which are pertinent, I believe, to our case.

THE MAGISTRATE: Any objection?

MR. DALEY: I am going to object to certain parts of the deposition, your Honor.

I was present in Rochester and as is normal, objections were reserved for the time of trial.

THE MAGISTRATE: You don't object to the admission of the deposition as a document, only to certain portions of it where you have reserved your objections?

MR. DALEY: That's correct, your Honor.

THE MAGISTRATE: That may be marked as

Exhibit 2, subject to objections to specific questions and answers.

MR. DE ORCHIS: I have the same position, your Honor.

THE MAGISTRATE: All right.

xxx (Deposition of Paul F. Shambo received and marked Plaintiff's Exhibit 2 in evidence.)

THE MAGISTRATE: How long is the section of the deposition you propose to read?

MR. KOCHENDORFER: Your Honor, if it would save time, I will point to the pages and, basically, the items are very short.

The lines in the deposition are very long, and I think if I just give you the essence of the item on that page and if counsel here have an objection to it, we can read the lines.

THE MAGISTRATE: Is that satisfactory to you, gentlemen?

MR. DALEY: That is satisfactory.

MR. KOCHENDORFER: On page 5, at line 8, the shipper identified the invoice.

At this time I would like to offer into evidence the invoice for the shipment in question.

THE MAGISTRATE: Show it to your adversary.

MR. DE ORCHIS: If your Honor please, the invoice is several pages long and covers a great many items which were in the cases rather than the individual boxes.

I think in this case it is important to point out where in this invoice is the crate we are talking about.

MR. KOCHENDORFER: I will identify the particular page in question.

THE MAGISTRATE: For purposes of possible subsequent reproduction, can you not narrow the exhibit?

MR. KOCHENDORFER: Yes, I will take out the page in question, if that is acceptable.

THE MAGISTRATE: I would prefer that if you can do it.

MR. KOCHENDORFER: I can. It is on one page.

THE MAGISTRATE: All right. The record will reflect you are separating the original invoice and removing a single page.

MR. KOCHENDORFER: The single page indicates on it just the item which was in the one crate, that it refers to the generator.

MR. DALEY: I object to that, your Honor. This man had no knowledge and he testified he had no knowledge of what was in the crate.

This crate was packed in Tampa, Florida. All he knows from that invoice is that it was billed.

MR. DE ORCHIS: I agree, your Honor. The witness testified that he did not know that, in fact, what was in this box.

THE MAGISTRATE: I think we can allow the admission of the document as being an invoice received by the shipper without taking it to prove the contents of the crate.

MR. DALEY: Very well, your Honor.

xxx (Invoice from Shuron/Continental, dated December 7, 1973, received and marked Plaintiff's Exhibit 3 in evidence.)

MR. KOCHENDORFER: Your Honor, on page 7 of the deposition of the shipper, the shipper relates the invoice to the bill of lading.

And on page 8 he indicates that the total sum of goods on the invoice are equal to the total sum of the goods on the bill of lading.

MR. DALEY: Objection, your Honor.

The invoice does not point out what

packages these goods were contained in. There is no packing list attached to this invoice.

We don't know how many packages that invoice covers.

This man, again, had no personal knowledge as to how it was packed in Tampa, Florida. All we have is an invoice listing various goods.

The man himself testified, and there are complaints by Elgie Company, that they were supposed to receive two cartons and they received eight.

MR. KOCHENDORFER: Your Honor, further in the deposition the witness testified on page 60. In order to avoid the confusion, you can read the statements there. He testified that the confusion was as to the individual parts in the tri-wall cartons, that all the parts went in tri-wall cartons and the generator went into a wooden crate, and neither the **generator** would go into a tri-wall carton nor would the parts go into a wooden crate.

MR. DALEY: I object, your Honor, because, again, this man had no personal knowledge as to how this shipment was packed.

THE MAGISTRATE: I will have to read his entire deposition to get the flow of that, but for the moment I think you best pass on, unless there is another exhibit connected with this.

The present question you are attempting to establish is whether the crate involved in that invoice is the same crate referred to in the bill of lading.

MR. KOCHENDORFER: Yes, sir.

He identified the mark numbers on the invoice as the mark numbers on the bill of lading.

THE MAGISTRATE: Let me see both exhibits.

MR. KOCHENDORFER: Yes.

The mark he is referring to is the 286M on the bottom.

(Handing.)

THE MAGISTRATE: Out of the 12 items involved, you say he testifies that the crate is the one designated as "Ship Number 286M" and it is so designated on both the bill of lading and on the invoice as the last item?

MR. KOCHENDORFER: That's correct.

THE MAGISTRATE: All right. I will have to read his entire deposition in that regard.

MR. DALEY: Again, I would just like to raise one point.

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While it might be true that the invoice would show what was billed and the bill of lading would show what the mark number is, there is still no evidence introduced as yet as to what was in that crate.

THE MAGISTRATE: That would go, I would think, to the question of damages for the value of the crate in the event that the package limitation does not apply.

MR. DALEY: That's correct, your Honor.

MR. KOCHENDORFER: Your Honor, on page 8, the witness was asked, "And on this invoice, do you find an item on there with an invoice value representing what would be the one crate on the bill of lading?

"Yes."

MR. DALEY: Objection, your Honor. That is a leading question. That was posed by counsel for the plaintiffs.

THE MAGISTRATE: What page are you on now?

MR. KOCHENDORFER: Page 8.

THE MAGISTRATE: Line 10?

MR. KOCHENDORFER: Yes.

Line 5.

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THE MAGISTRATE: Counsel, leading is a matter of form, I would think, and you should have asserted that objection during the course of the deposition.

MR. DE ORCHIS: I don't think his objection is exactly facetious.

The point is being made here by both the defendant and the third party defendant that the carrier or the stevedore received a crate. Now the man is trying to prove what was in the crate.

He called a witness. I don't think there is any dispute about it that the witness says, "I didn't pack the crate, I don't know what was in the crate and, in fact, there was some confusion about this shipment."

So we, I think, are entitled to put the plaintiff to his proof, as we do in all cargo cases, as to what was in this crate that we lost, because he is now saying it was the most expensive equipment included in this shipment of 12.

MR. KOCHENDORFER: Your Honor, the question, as you know, of what was in the crate goes to the damages in this case.

THE MAGISTRATE: I am well aware of that.

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MR. KOCHENDORFER: And your Honor has written on the question of damages and the proof required as to what is required for proof on damages.

I think if I can put on my case here and you can make a determination as to whether there is sufficient evidence to prove our damages --

THE MAGISTRATE: There is no question the threshold issue is whether or not the package limitation applies.

MR. KOCHENDORFER: Yes.

THE MAGISTRATE: And that is not a question that is going to be easily or quickly resolved, I would think.

If we do come to the point of finding that you have proved a case for actual value but that the proof of actual value is inadequate, I will give you the opportunity to present further evidence on damages if that becomes necessary.

Any objection to proceeding in that manner?

MR. DE ORCHIS: Yes.

THE MAGISTRATE: Because, you know, normally in these admiralty cases we bifurcate and try liability and then take up the question of

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damages on a separate hearing.

This case, of course, revolves primarily around the package limitation, which, in a sense, is a question of damages, but the legal issues leading up to it have nothing to do with the value of the cargo.

MR. DE ORCHIS: In order to get to the question of damages, Elgie, the plaintiff here has to prove, first, that it has a cause of action.

My position is that it does not have a cause of action on two grounds, among others.

The two that are pertinent here is, one, I don't see any proof that Elgie is entitled to bring this suit and, secondly, that the apparent good order and condition which appears in all bills of lading has been held over and over again to mean the apparent good order and condition of the outside of the crate and not an admission by the carrier as to contents.

So in cargo cases it is customary for the plaintiff to have to prove what was in the case, because all we get are boxes. We don't know what is inside. And here so far he has absolutely failed to prove that he shipped what he says was a generator,

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and I believe was, in fact, a grinder.

I mean, this is why I am saying it is not facetious at this point. It is an important issue in this case, what was in the case, and does he have a cause of action, because I don't think Elgie has a cause of action.

MR. KOCHENDORFER: On Mr. DeOrchis' comments here, if we could note for the record he believes it was a grinder, the testimony in the record shows that when they talk of a generator, they mean a generator of ophthalmic curves, which is basically a grinder of glass.

So if Mr. DeOrchis wants to call it a grinder, we can call it a grinder rather than a generator. I will be glad to do so.

MR. DALEY: Your Honor, if I may, I join in Mr. DeOrchis' objection.

I would also like to point out although in admiralty it is true trials are bifurcated in many cases, I would like to point out to the Court that Mr. Kochendorfer, not the defendant or the third party defendant, asked for a quick trial. He is the one that precipitated this trial before you, not the defendant or the third party defendant.

THE MAGISTRATE: In any event, the question whether damages has been proved is something I don't have to consider until the end of the case.

The objection as to leading is overruled.

Continue, please.

MR. KOCHENDORFER: On page 9, I asked the shipper if his records reflected that the item was shipped to Elgie & Company, and he indicated that they did.

MR. DALEY: I object, your Honor.

The man up in Rochester had no bill of lading, no dock receipt. He had no information whatever that this cargo was shipped.

THE MAGISTRATE: It becomes more and more apparent that I will have to read the entire deposition, which I will do.

Let me ask you, Mr. DeOrchis, is your objection to the question whether Elgie is a proper party plaintiff based on the fact that they were the consignee of the goods and not the shipper, and that under some circumstances title may not have passed so that the claim, if any, belongs to the shipper?

MR. DE ORCHIS: No. My point is that I

believe that Elgie sold this cause of action to its insurance company by subrogation and the suit here at this point, we should quit the game of saying Elgie has any interest.

Elgie isn't going to get a penny of this case, it is the insurance company.

If he wants to substitute the insurance company, we will put the house in order.

THE MAGISTRATE: You speak as if this is a unique situation.

I don't recall seeing an admiralty case that didn't have an insurer involved as the true party in interest.

MR. DE ORCHIS: That's right.

THE MAGISTRATE: And yet is is extremely rare, almost unheard of, to substitute the insurance carrier for the insurer.

MR. DE ORCHIS: If he wants to keep Elgie as the plaintiff in the case, then he has to prove Elgie has a cause of action. That's all I'm saying.

THE MAGISTRATE: If he goes the other way and proves what his insurance carrier paid to Elgie, you will object that the payment by the insurance carrier to Elgie has absolutely no controlling basis as to the value of the goods, and you will be quite right in that regard.

MR. DE ORCHIS: That's right.

But the insurance carrier then becomes the real party in interest, and as of the time of trial the real party in interest should appear in the Complaint, not the insured, who has sold away his cause of action.

THE MAGISTRATE: It is customary to proceed by a loan receipt, so as to keep the nominal claim in the name of the insurer. We don't know yet whether or not that occurred here.

I would think at most it is for you a matter of defense to establish that Elgie was completely paid and has, in effect, turned his claim over to its carrier, if that is the case.

MR. DALEY: Your Honor, if I may, I would like to point out that the invoice which Mr. Kochendorfer has entered into evidence, the invoice says CIF Durban , so I think there is a crucial question right from the beginning as to who is the real party in interest.

THE MAGISTRATE: That is what I thought Mr. DeOrchis was urging earlier.

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MR. DALEY: He didn't say it and I just wanted to clarify for the Court it does say CIF Durban.

MR. KOCHENDORFER: If I may interject at this point, I have with me today the freight forwarder who will testify as to the documentation and the presentation of the document against the letter of credit.

THE MAGISTRATE: All right. Let us move on now.

MR. DE ORCHIS: To go back to the point that we were arguing about what was in the case, on page 27, two questions and answers show why we are objecting to this line of evidence that he is trying to introduce here.

At the top of page 27:

"Q No, I'm not asking that. I'm asking, do you have personal knowledge of what was actually packed into each case?

"A No.

"Q So is it possible that this case was supposed to, according to the documents, have a generator in it, but is it your testimony today that you don't know whether or not a generator

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went into this case?

"A I have no personal knowledge."

MR. KOCHENDORFER: Your Honor, in this case the gentleman was testifying from the records of the corporation and, as you know, there is a presumption of regularity.

They intend to file a claim on the day they shipped the cargo and fortuitously one out of 12 was lost in shipment, all of the other 11 arrived.

There was no claim for anything or any parts that were in there. The only claim is for the one crate which had the generator or grinder, as Mr. DeOrchis calls it, and I believe that this is sufficient to establish what was in the crate.

THE MAGISTRATE: Gentlemen, you are arguing the ultimate point to be derived from the testimony given by this witness. There are no pending objections to any portion of the testimony.

Why don't we reserve all of this argument until the end of the trial and move on with this. Only if we get to the point were there is a question of admissibility should you stop to raise these issues.

Next.

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MR. KOCHENDORFER: On page 13, your Honor, the witness was asked, "Were you paid by Elgie & Company?"

And the answer was "Yes."

MR. DALEY: Your Honor, if I might clarify a point, the witness testified that they were not directly paid by Elgie & Company, they were, in fact, paid by Copeland. They were not paid by Elgie.

MR. KOCHENDORFER: I have the witness here from Copeland today who is going to clarify the issue of who was paid and how they were paid.

THE MAGISTRATE: I get the impression, Mr. Kochendorfer, that this manner of proceeding is causing more trouble than it is worth.

I think that I had best read the deposition at the appropriate time.

I realize there are certain things in it that you would like me to know before I get to the other witnesses, but virtually every aspect of this seems to lead your adversaries to their outraged cries.

Perhaps we can avoid this by simply have you summarize for me what you believe the deposition establishes. That way we don't get into these muddy issues at the moment.

I will then allow them each, if they like, a moment or two to tell me why they don't think the deposition establishes that and we can get this thing moving again.

MR. KOCHENDORFER: Your Honor, I have a summary here, and I believe that the deposition reflects that Shuron/Continental, a division of Texton Corporation, sold a generator and a number of parts relating to optical machinery to plaintiff Elgie & Company in 1973 pursuant to the invoice, which has been identified, against an irrevocable letter of credit, which was also identified by the shipper at the deposition.

The letter of credit called for the drafts to be accompanied by, amongst other things, a full set of clean on board shipping company's bills of lading consigned to order, blank endorsed, marked "Freight Prepaid."

Subsequent to that, the shipper indicated that they had sent a replacement machine with a value X the factory of $9,537, and this was the value of the generator without any freight or insurance on it on the date that the vessel arrived

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at South Africa on April 29th, because the price increase had gone into effect on January 1st of that year or at the beginning of January.

On about page 60, Mr. Shambo described how a generator is shipped and that there can be no confusion about shipping the generator and the other items shipped because the generator went into a wooden crate, the parts went into cardboard boxes, and a generator was never shipped in a cardboard box and the parts were never shipped in a crate, and if anything else went in the crate, it would be another generator.

He also indicated that they had been paid in full for the shipment.

Now I would like to call my first witness, who is Mr. Catania here.

MR. DALEY: Your Honor, are we all going to summarize what the deposition stated or are we going to leave it up to Mr. Kochendorfer to state what the deposition states?

THE MAGISTRATE: You can do it either two ways; you can either argue at the conclusion or your post trial brief what the testimony establishes, unless you believe that there should be a crucial aspect which must be taken up preliminarily because it takes it up with the witness.

MR. DALEY: I have an index as to excerpts from that deposition which I think are important.

THE MAGISTRATE: Fine. I will take that.

MR. DALEY: With attached exhibits.

I would just like to point out, although it has been pointed out prior by Mr. DeOrchis, this man, in the first place, he was not in the position or directly involved with this shipment at the inception, it was somebody else by the name of Mr. Laurna employed by Snuron. This man had no personal knowledge.

THE MAGISTRATE: You are arguing the weight to be given to the evidence now, and that is something I can look into later on.

I will treat this as a brief or a submission by the other side just as Mr. Kochendorfer's summary of what the witness testified.

Will the reporter swear the witness, please.

JOSEPH CATANIA, called as a witness by the plaintiff, being first duly sworn, testified as follows:

MR. DE ORCHIS: If your Honor please, I

will deal with that point in the post trial brief, the review of the deposition.

THE MAGISTRATE: Thank you.

DIRECT EXAMINATION

BY MR. KOCHENDORFER:

Q Mr. Catania, by whom are you employed?

A Copeland Shipping.

Q And did you work for Copeland Shipping in 1973?

A Yes.

Q 1974?

A Yes.

Q And what relation did Copeland Shipping have, if any, with Shuron/Continental?

A Shuron is one of our shipping accounts.

Q And what capacity was Copeland Shipping?

A We act as freight forwarder for them.

Q And in March of 1974, did Copeland Shipping maintain certain records with respect to the handling of the accounts of its customers?

A Yes.

Q And are those records in your custody?

A Yes.

Q And at my request, did you search your records for records relating to a shipment in March of 1974 on the S.A. NEDERBURG?

A Yes.

Q In March of 1974 did you handle a shipment for Shuron/Continental relating to one crate and 11 cartons of optical equipment?

A Yes.

Q And could you tell us, sir, what documents were received in your office from Shuron/Continental with respect to this shipment?

A Shipper's commercial invoices.

Q And were there any instructions with them?

A Yes; instructions as to how to effect shipment.

Q And what were those instructions?

A Briefly, to comply with the terms of a letter of credit.

Q And at what bank was that letter of credit?

A Barclays Bank.

Q And could you tell us what those terms were that you had to comply with?

A Shipping terms?

Q Yes.

A I happen to know the terms were CIF.

MR. KOCHENDORFER: Your Honor, at the time of marking the invoice, the last page of the invoice, which was not put in with that -- may I offer that to the witness?

THE MAGISTRATE: Surely.

MR. KOCHENDORFER: Let us see if that refreshes his recollection.

A Yes. I do have my copies here.

Q Do you have your copies there?

A Yes.

Q Will you look at that and see if that matches your copy?

A Yes, it does.

Q And what were the terms of the shipment?

A CIF Durban.

Q And what did the bank require to be presented against an irrevocable letter of credit?

A Full set clean on board shipping company bills of lading.

Q Subsequent to receiving these documents from Shuron/Continental, did you make the arrangements for the transportation of this shipment?

A Yes, we did.

Q And where did it originate? Where did the shipment originate?

A Tampa, Florida.

Q And did you make the arrangements -- could you state the step-by-step transportation that you arranged for?

A The freight was shipped in to us. We, in turn, arranged transportation to the pier.

THE MAGISTRATE: Shipped to you where? Where did you receive it?

THE WITNESS: At our premises.

THE MAGISTRATE: Where is that?

THE WITNESS: In Jamaica.

THE MAGISTRATE: By Jamaica, you mean Long Island?

THE WITNESS: Yes, sir. Sorry.

Q And how was that shipment accomplished?

A From our premises?

Q No, to your premises.

A By common carrier. Motor common carrier.

Q Were there certain charges for that?

A Yes, there were.

Q And did you compute those charges?

A Yes.

Q Did you put those charges onto the invoice to be added to the factory price?

A Correct.

Q And was the freight bill paid?

A Yes, it was.

Q And subsequent to that, did you arrange to have the shipment transported to the pier?

A Yes.

Q And how was that done?

A Via pier trucker.

Q And was there a charge for that?

A Yes, there was.

Q And was that paid?

A Yes, it was.

Q And at the pier, was the cargo received?

A Yes.

Q And did you, in the course of business, receive a dock receipt for that shipment?

A Yes, we did.

Q Do you have that dock receipt with you?

A Yes, sir.

MR. KOCHENDORFER: I would like to offer the dock receipt into evidence.

THE MAGISTRATE: Show it to your adversaries.

(Pause.)

MR. DE ORCHIS No objection.

MR. DALEY: No objection, your Honor.

THE MAGISTRATE: It may be marked as Exhibit 4.

xxx (Copy of dock receipt dated **March 13,** 1974 received and marked Plaintiff's Exhibit 4 in evidence.)

BY MR. KOCHENDORFER:

Q Subsequent to that, did Copeland Shipping receive from the steamship carrier an on board bill of lading?

A Yes.

Q I ask you to look at Exhibit 1.

(Handing.)

Is that the bill of lading?

A Yes, it is.

Q And after receiving the on board bill of lading, did Copeland Shipping present the documents, including the on board bill of lading, to the Barclay Bank?

A Yes.

Q Do your records indicate when the Barclay Bank received -- do you have a document with the receipt on it?

A This is the date and time stamp of the Barclay Bank as to when the documents were received.

Q What is this document that you have just handed to me?

A It is a copy of a sight draft.

MR. KOCHENDORFER: Could I offer the sight draft into evidence.

THE MAGISTRATE: Mr. DeOrchis?

MR. DE ORCHIS: I would like to know whether the witness received this document --

Do you receive this in the regular course of business?

THE WITNESS: Yes.

MR. DE ORCHIS: I have no objection to it.

MR. DALEY: No objection to the exhibit, your Honor.

THE MAGISTRATE: It may be marked in evidence.

xxx (Copy of sight draft, date stamped April 17, 1974, received and marked Plaintiff's Exhibit 5 in evidence.)

THE MAGISTRATE: In terms of value, Mr. Kochendorfer, I don't think this document helps any, because it merges all the --

MR. KOCHENDORFER: I am going to relate it to the invoice.

THE MAGISTRATE: All right. Continue.

Q Mr. Catania, can you look at the sight draft and look at the last page of the invoice which was presented earlier, and could you compare the prices on the invoice with the price on the sight draft.

A Yes.

Q Are they the same?

A Yes.

MR. KOCHENDORFER: I would like to at this time mark the last page of the invoice which reflects the total charge for the shipment into evidence.

THE MAGISTRATE: Does it also break it down cartons and crates?

MR. KOCHENDORFER: It breaks it down by invoice number, and the one item on here, invoice Number 373985, which was the single invoice here for the one crate containing the generator and it indicates the value of that item.

THE MAGISTRATE: All right. Show it to your adversaries.

MR. DALEY: Your Honor, I just have one

question.

If Mr. Kochendorfer is putting this in only to show the invoice value of the alleged crate in question --

MR. KOCHENDORFER: This was the invoice as identified and I am putting in the invoice. That is the last page of the invoice.

MR. DALEY: Your Honor, I only have one objection as to the total amount there.

There is no breakdown as to how much ocean freight or whatever was charged on this crate in question.

MR. KOCHENDORFER: Mr. Catania will testify to that.

THE MAGISTRATE: It will be admitted subject to further testimony as to what portion of the freight charges pertain to the crate and what portions to the cartons.

Incidentally, Mr. Catania, you used the phrase earlier in describing the terms as being CIF Durban.

I am familiar with what CIF means, but I think you ought to explain for the record what it embodies.

THE WITNESS: It encompasses charges of cost of goods, insurance and freight charges.

THE MAGISTRATE: We are now dealing with the question of what portion of the total freight charges are attributable to the crate

xxx (Copy of invoice dated January 25, 1974 received and marked Plaintiff's Exhibit 6 in evidence.)

BY MR. KOCHENDORFER:

Q Mr. Catania, do you have with you in your file an ocean freight bill from the steamship carrier?

A Yes, I do.

(Handing.)

MR. KOCHENDORFER: I would like to mark it into evidence.

THE MAGISTRATE: Show it to Mr. DeOrchis.

(Pause.)

MR. DE ORCHIS: I have no objection, your Honor.

MR. DALEY: No objection, your Honor.

THE MAGISTRATE: It may be received as Exhibit 7.

MR. KOCHENDORFER: Your Honor, before trial I had discussed this with the defendant's attorney and also with Mr. Catania for a breakdown, and Mr. DeOrchis and myself agree that the breakdown value of the ocean freight as applied to the one crate is $557.55.

If the third party defendant is willing to agree to that, we can avoid the computations.

MR. DALEY: May I please see the letter you are referring to?

MR. KOCHENDORFER: Yes.

(Handing.)

MR. KOCHENDORFER: That was based on a 40-cubic feet measurement times --

MR. DALEY: Your Honor, I have no objection as to the issue of what this states as to the ocean freight for this one crate.

THE MAGISTRATE: All right.

This, in fact, was paid to the defendant?

Q Was that item paid?

A Yes, it was.

THE MAGISTRATE: Received.

xxx (Copy of bill of lading dated March 18, 1974 received and marked Plaintiff's Exhibit 7 in evidence.)

xxx (Letter dated March 15, 1976 to

Bigham Englar from Haight Gardner received and marked Plaintiff's Exhibit 8 in evidence.)

BY MR. KOCHENDORFER:

Q Mr. Catania, I would like you to review the invoice again, and could you tell us what the size of the crate was that we were referring to?

A At a height of 64-1/2 inches, a length of 55-3/4 inches and a width of 55-3/4 inches, with a weight of 1880 pounds.

Q On the invoice which you referred to earlier, you testified that there were certain inland freight charges paid.

At my request, did you make a computation as to what the pro rata portion of the inland freight charges would have been as for the one case in question, that is, freight charges paid to truckers?

A I didn't prorate that particular one.

Q Could you prorate that one?

A Sure.

THE MAGISTRATE: How long will it take to do that?

MR. KOCHENDORFER: Your Honor, if you would like to take the time, he can do it.

But if the counsel has no objection, I

roughly prorated it and it came to a figure of $372 as against this crate.

MR. DALEY: Roughly prorated it upon what?

MR. KOCHENDORFER: On the invoices that went to the trucking companies.

MR. DALEY: What is the foundation for the proration? I mean, is it by cubic inch, by weight or what?

THE MAGISTRATE: Give us the weight by volume.

MR. KOCHENDORFER: On this one I think it was by weight.

THE MAGISTRATE: In any event, rather than waste more time with what is a relatively mathematical approach, albeit that I acknowledge that it depends in part whether truckers charge by weight or volume, will you please work on that over the weekend and come back with something next week? I don't want to stop now for that.

Q Can you tell us from your records there on the freight?

MR. KOCHENDORFER: We will mark the freight bills into evidence if you would like.

A What is it that you would like prorated?

Q The trucking charges.

A From where to where?

Q From Tampa to New York and from your premises to the pier.

A It can be done very simply.

Q All right.

THE MAGISTRATE: We want the proportion of the total charges that related to the crate.

Off the record.

(Discussion off the record.)

A I am prorating it by weight for the one crate weighing 1880 pounds.

The per pound rate comes to .19836, making the inland freight charges for that crate $372.92.

Q Can you repeat that figure?

A $372.92.

Q And on this particular shipment, did you arrange for the insurance?

A Yes, we did.

Q And was an insurance premium paid?

A Yes, it was.

Q And have you computed how much of the insurance premium was prorated to this particular case?

A $72.

Q In the course of business, did Copeland Shipping send an invoice to Shuron/Continental?

A Send an invoice to Shuron?

Q Yes.

A Yes.

Q Do you have a copy of that invoice?

A Yes.

(Handing.)

MR. KOCHENDORFER: I would like to offer that invoice into evidence.

MR. DE ORCHIS: I would object to the invoice, unless we tie this invoice somehow into this crate.

From reading it, I don't see any information about the crate.

MR. KOCHENDORFER: It is for the entire shipment.

THE MAGISTRATE: I understand that.

I think his testimony is that of that entire charge, $372.92 is the portion of the freight charge covered by the crate and $72 is the portion of the insurance charge covered by the freight, and now he is simply establishing that for the entire shipment, including the 11 cartons, the original shipper was billed.

MR. DE ORCHIS: I have no objection to it if the witness will say that this refers to the shipment in suit.

He says he sent him an invoice. I would like him to say --

THE MAGISTRATE: All right. Show it to the witness.

Does this refer to the total shipment of 11 cartons and one crate?

THE WITNESS: Yes, sir, it does.

THE MAGISTRATE: That is the crate that is in suit, to your knowledge?

THE WITNESS: Yes, sir.

THE MAGISTRATE: And it is the same one, to your knowledge, that is referred to in the bill of lading and the invoice?

THE WITNESS: Yes, sir.

MR. DE ORCHIS: I have no objection.

THE MAGISTRATE: Mr. Daley?

MR. DALEY: I have no objection, your Honor.

xxx (Copy of invoice dated April 16, 1974 received and marked Plaintiff's Exhibit 9 in evidence.)

THE MAGISTRATE: I think the record should reflect that in addition to the inland freight and the freight to the pier --

MR. KOCHENDORFER: Yes, I am going to bring that out. There are additional charges.

THE MAGISTRATE: There are additional charges here.

MR. KOCHENDORFER: I was going to ask Mr. Catania to prorate the additional charges.

THE MAGISTRATE: I think it is all of $60.

Do you want to prorate that portion? Go ahead.

MR. KOCHENDORFER: They are not stipulating to the damages so we have to go through this.

THE MAGISTRATE: They are not stipulating to the damages primarily because they say you haven't established that the crate contained the generator or grinder, depending upon how you care to term it.

I don't think they are arguing over --

MR. KOCHENDORFER: No. Mr. DeOrchis indicated that he would not stipulate to those charges, either.

MR. DE ORCHIS: What charges?

THE MAGISTRATE: Freight forwarder's charge --

MR. DE ORCHIS: Suppose you pick a number out of your head and I will agree to it.

THE MAGISTRATE: The forwarding services and the consolidation services and the handling services and the preparation of documents together all come to a total of $61.77.

MR. DE ORCHIS: I will accept the witness' ball-park figure.

Will you give us one for this crate?

THE MAGISTRATE: That is the total for all.

How much goes for this crate; roughly half?

THE WITNESS: Again, we have to prorate it by weight.

MR. DE ORCHIS: Can you give us an estimate? Out of $61, how much would have been for the crate, just to save time?

THE MAGISTRATE: Taking in the insurance, the insurance was about 40 percent of the total.

MR. KOCHENDORFER: That was on value, though.

THE MAGISTRATE: That is value, that is

true.

I don't know. Some of these other things may be done on value.

THE WITNESS: $20.

THE MAGISTRATE: Can we stipulate to $20?

MR. DE ORCHIS: We stipulate to $20.

BY MR. KOCHENDORFER:

Q Just to, again, clarify, all the documents that you have been presented have been kept in the regular course of business?

A Yes.

Q And all the items that you have testified to have been paid?

A Yes.

Q There was some confusion, perhaps, according to Mr. Daley, about the presentation or the payment of the funds.

In the course of business in dealings with Copeland Shipping, are you familiar with how the bank pays the sight draft?

A The bank remits direct to the shipper or complies with the terms of the credit.

Q And if they remit it to the shipper, then the shipper pays you for the freight and insurance charges?

A Correct.

Q Thank you.

MR. KOCHENDORFER: That is all I have for this witness.

THE MAGISTRATE: Cross-examination.

We will start with the defendant, Mr. DeOrchis.

CROSS-EXAMINATION

BY MR. DE ORCHIS:

Q Mr. Catania, I show you this document.

(Handing.)

Can you identify it?

A This is the letter of credit.

Q Does that cover the shipment in suit?

A Yes.

Q Including the crate?

A Yes.

MR. DE ORCHIS: I offer it in evidence.

THE MAGISTRATE: Show it to Mr. Kochendorfer.

MR. KOCHENDORFER: Your Honor, is this the one that was included in the deposition of Mr. Shambo?

That was presented to your Honor with the deposition of Mr. Shambo and [illegible], unfortunately, in summarizing, it was the letter of credit. That was included in there.

If you want to make it as part of that exhibit or Mr. DeOrchis', it makes no difference to me.

THE MAGISTRATE: Let me ask the defendant and the third party defendant, with respect to the deposition exhibits, are there any of those exhibits which are being objected to?

Some of them have already been introduced separately in evidence.

MR. DALEY: As far as I know, your Honor, there are no objections by the third party defendant as to any of the exhibits.

THE MAGISTRATE: How about you, Mr. DeOrchis?

MR. DE ORCHIS: I would not object to any of the commercial documents, which are Exhibits 1 and 2.

But the exhibits that are telexes that went back and forth and to which that witness was not a party, I would object to that sheaf of telexes. But the commercial documents I would have no objection to.

THE MAGISTRATE: Do you wish to offer the letter of credit separately even though I am told it is one of the deposition exhibits, although I should say I can't quite locate it.

MR. KOCHENDORFER: It is folded.

THE MAGISTRATE: I see it. All right.

Do you wish to offer it separately nevertheless? You can do so if you want.

MR. DE ORCHIS: Yes. I will offer it as our Exhibit A.

THE MAGISTRATE: All right.

MR. DALEY: Your Honor, if I may, the third party defendant is offering all the exhibits that are attached to the deposition and raise no objection to any of them.

There are various telexes in there which were received by Shuron/Continental in Rochester. There are also letters received by Shuron/Continental in Rochester.

It is testified the man who received this was not correspondence, but he did testify they were business records of Shuron.

MR. KOCHENDORFER: That is correct, your Honor, I would agree to that.

THE MAGISTRATE: As to Mr. DeOrchis' objection to the three telexes, I won't be able to consider that until I have read the deposition transcript.

Your position is regardless what he knows about it, he was the custodian of the business records and they were business records kept in the regular course of business and, therefore, are admissible on that basis.

MR. DALEY: That is correct.

THE MAGISTRATE: We will mark as Exhibit A the letter of credit.

This will be Defendant's Exhibit A, and we will designate the third party defendant also with letters but as third party defendant exhibits.

xxx (Photocopy of letter of credit, dated September 6, 1973, received and marked Defendant's Exhibit A in evidence.)

BY MR. DE ORCHIS:

Q Mr. Catania, was it your company that paid the freight on March 22nd?

A Correct.

Q And did Shuron reimburse you for that?

A Yes, they did.

Q The insurance, was it your company that advanced the money for the insurance?

A Yes.

Q And did Shuron reimburse you for that?

A Correct.

Q Did the insurance cover the entire carriage from Tampa to destination in Durban? Was it a warehouse to warehouse insurance?

A No.

Q What did it cover?

A From warehouse to warehouse meaning my warehouse to warehouse in Durban, not from Tampa.

Q So the insurance that Shuron reimbursed you for was from New York to Durban?

A Correct.

Q On the freight invoice, there is a notation PD, which I take it means paid.

A Paid.

Q 3/22.

Can you tell me who made that notation?

A Probably one of my people.

Q Is that the customary way you mark your bills if they have been paid?

A No.

Q You really don't know who made that notation; is that correct?

A I have a good idea, but in actuality no.

We have a more formal method of payment.

Q Do you have any record there, that more formal method of payment?

A No, no.

Q At any rate, you were paying the freight on behalf of Shuron?

A Correct.

Q What is the more formal way that you have of marking your bills when they are marked paid?

A We submit our bills for payment to our West Coast headquarters in Los Angeles.

However, in this case, because of prepaid and on board was required to comply with the terms of the credit, we had to issue a check before we could receive the ladings back, so in this case here a check was presented before the ladings were actually received.

Q So the ladings would be picked up after the ship sailed?

A Yes.

Q Because of on board stamp?

A Yes.

MR. DE ORCHIS: I have no further questions.

CROSS-EXAMINATION

BY MR. DALEY:

Q Mr. Catania, do you know when the trucker picked up the shipment in Tampa, Florida, or do you have any document which would tell you that?

A Not that -- no, I don't think so.

I don't arrange that, the shipper does.

Q The shipper arranges the shipment from Tampa, Florida to New York?

A Yes.

Q You don't have any bill of lading or whatever within your documents?

MR. KOCHENDORFER: Your Honor, I think, just for the record, we should show that Mr. Catania is appearing here also under subpoena with his documents by Mr. Daley, who issued a subpoena to him for his files and his documents.

A Yes, I do have a copy of the inland bill of lading.

Q What is the date of that inland bill of lading?

A November 30, 1973.

Q November 30th?

A Yes.

Q And does it say from a point to a point?

A Yes.

Q And what is the point of origin?

A Tampa, Florida.

Q And point of destination is you? Are you listed there as the consignee?

A Yes.

Q From your records, can you tell me when it arrived at your warehouse or plant in Jamaica, New York?

A December 12th.

Q December 12th?

A Yes.

Q 1973?

A Yes.

Q Do you know what happened to the shipment between November 30th and December 12, 1973?

A No.

Q And what date did you deliver the shipment to the ocean carrier?

A March 15th of 1973.

Q You are sure it is March 15th?

I will show you a copy of your dock receipt.

(Handing.)

That might refresh your recollection.

I believe there is a stamp in the upper right-hand corner.

A Yes. The 13th.

Q March 13th. That would be 1974; is that correct?

A Yes.

Q So do you have any personal knowledge as to what happened to the shipment in question between November 30, 1973 and March 13, 1974?

A No.

Q None whatsoever.

Did you or anybody in your employ ever open up any of these cases?

A No.

Q Did you or anybody in your employ ever weigh these cases?

A Yes.

Q When?

A All shipments that come into our house as a matter of policy are weighed.

Q Do you have any documents which would show the weight of this one crate?

A No.

Q You do not?

A No.

MR. DALEY: I am asking for a weight slip.

MR. KOCHENDORFER: I thought you meant does he have any document.

There was a document in evidence.

MR. DALEY: I am asking him for his document, a document of Copeland Shipping that says that "We weighed the shipment and it weighed X."

Q Do you have any such document?

A When you say we weighed a shipment, which shipment?

Q Or a crate or a package.

You said you weigh every shipment that comes into your warehouse; is that correct?

A Yes.

Q Do you have a document in your file --

A No, no.

Q -- which shows that weight?

A No. If it complies with the inland bill of lading, we assume that to be correct.

Q And where is the information on the inland bill of lading obtained from?

A From the origin point.

Q From the shipper?

A Or the origin point of the freight, yes.

Q Does the trucker weigh it?

A I don't know.

Q Does anybody besides Shuron ever open up this crate or ever pack this crate to make sure of what is inside of it?

A I don't know.

Q So isn't it a fact, sir, that all that you received was a crate that weighed X number of pounds? I am talking specifically about the crate in question now.

A Yes.

Q Sir, how long was this shipment in your plant? Give me the date it got to your plant and the date it left your plant.

A It arrived on December 12th of 1973, it left my plant on I would estimate March 12th, so approximately three months.

Q You testified that it is weighed when it comes in.

Is it also weighed when it leaves?

A No.

Q It is not?

A No.

Q So you have a period of three months there and nobody has weighed what the content of that shipment is; is that correct?

A Correct.

Q Do you know if when this is taken to the ITO terminal or whatever terminal it is, it is weighed by ITO?

A I don't know.

Q So from the best of your knowledge, at the time this crate left your plant, all you had was a crate?

A Correct.

Q You don't know the weight of it, you don't know what was in it; is that correct?

A I know the weight of it. I don't know what was in it.

Q How do you know the weight of it if you testified you didn't weigh it when it left?

A We weight the original -- we weigh shipments when they come into the house. We do not weigh them going out.

Q Okay.

All my question is, you had this shipment in your house for a period of almost three months.

A Yes.

Q You weighed it when it came in.

A Yes.

Q Therefore, you have a period of three months when this shipment was not weighed and it was not weighed when it left your premises; is that correct?

A Correct.

Q So of your knowledge or from your documentation, can you tell me what the exact weight of that crate was when it left your plant in March of 1974?

A I can only assume it was the same weight as when it came in.

Q I am not asking for your assumption, sir. I am asking you, can you definitely state what the weight was?

A No.

Q Sir, could you tell me the procedures for booking cargo aboard an ocean carrier?

A Our procedure is to call the steamship company and request a booking.

Q Did you do that in this case?

A Yes, we did.

Q And who did you call? What company? I just want to know what company.

A South African Marine.

Q And did you book this cargo aboard a certain vessel?

A Yes.

Q What was the name of the vessel that you booked this cargo aboard?

A The MORGENSTER.

Q The MORGENSTER?

A Right.

Q At the time you booked this cargo aboard the MORGENSTER, were you notified by anybody at South African Marine or anybody else that this shipment would not go on the MORGENSTER?

A Not to my knowledge.

Q So as far as you knew, when they told you "We are taking it on the MORGENSTER," as far as you knew, it was going on the MORGENSTER?

A Yes.

Q Did you send out any correspondence or any telexes to Elgie saying, "Hey, it's going on the

MORGENSTER"?

A Not that I know of.

Q Not that you know of?

A No.

Well, not that my file shows, either.

Q Do you have any direct contact with the consignee of a shipment or is your only involvement with the shipper?

A Primary involvement is with the shipper.

Q You arrange the shipment according to the shipper's instructions, correct?

A Correct.

Q It is not up to you when the consignee is to receive it or when he is to receive it?

A Correct.

Q Did you ever receive any instructions from Shuron that this shipment had to be loaded aboard a ship or vessel by a specific date?

A No.

Q None whatsoever?

A Not that my records show.

Q This shipment was taken to the South African Marine dock; is that correct?

A Yes.

Q Where is that dock located?

A The dock receipt shows Brooklyn Army Base.

Q Could you tell me the procedures about the issuance of a dock receipt, if you are familiar with them?

A On our part?

Q Yes.

A I don't understand that question.

Q Okay.

Isn't it a fact, sir, that a trucker, your trucker, takes the shipment to the pier or terminal, a checker checks the cargo as to number, 11, 12, whatever the number is, and then you are issued a dock receipt by somebody? Is that correct?

A The dock receipt is made up by us.

Q The dock receipt is made up by you, but aren't there tallies on the back of that dock receipt, specifically referring to Exhibit Number 4? Are there any tallies on the back?

A No. It's blank.

Q Is it signed by anybody?

A I can't make out the individual's signature. It does seem to bear a receiving clerk's name.

Q Does it say what vessel it is supposed to be on?

A Yes. The South African MORGENSTER.

Q And are there numbers after that?

A March 15th.

Q Do you prepare this document after you book the cargo?

A Yes.

Q What other documents do you prepare after you book the cargo?

A The bills of lading and delivery instructions.

Q Do you have a copy of the bill of lading you prepared after you booked the cargo?

A Yes.

Q That you prepared?

A Yes.

Q May I see a copy of that, please?

A Yes.

(Handing.)

Q Sir, you handed me a group of documents, and you stated you prepared these documents.

A Yes.

Q You stamped S.A. NEDERBURG on those documents?

A No.

Q You did not?

A No, we did not.

Q Okay.

Do you have a copy of the bill of lading in your file that doesn't have the stamp over it which was the one you originally prepared?

THE MAGISTRATE: While he is looking for that, can you tell me, Mr. DeOrchis, whether the letters S.A. in front of NEDERBURG, MORGENSTER, et cetera, stand for South African or something else?

MR. DE ORCHIS: South African. All the names are South African.

A This would be a copy, one of the originals that was not changed.

(Handing.)

Q Would it be okay if I separate these?

A Sure.

Q I show you this document, sir, and ask if you can identify this document.

(Handing.)

A A copy of our bill of lading.

Q And this is the one you prepared?

A Yes.

Q And this is the one that you prepared after you booked the cargo; is that correct?

A Yes.

Q What is the carrying vessel designated as?

A South African MORGENSTER.

MR. DALEY: I would like to have this marked in evidence as Third Party Defendant's Exhibit A.

THE MAGISTRATE: Any objection, gentlemen?

MR. DE ORCHIS: No objection.

THE MAGISTRATE: It will be received.

xxx (Original bill of lading received and marked Third Party Defendant's Exhibit A in evidence.)

Q Sir, are there any other documents you prepared after you booked this cargo aboard the MORGENSTER in March of 1974?

A Not that I --

Q Do you have delivery instructions?

A Yes.

Q Do you have any kind of an intermodal bill of lading?

A That is a copy of the delivery instructions.

(Handing.)

Q This is a copy of the delivery instructions?

A Correct.

Q Who prepares this, sir?

A We do.

Q You prepare it?

A Yes.

Q After you book the cargo?

A Yes.

MR. DALEY: I will have this as Third Party Defendant's Exhibit B.

THE MAGISTRATE: Show it to your adversaries.

MR. DE ORCHIS: I have no objection.

THE MAGISTRATE: There being no objection, it may be marked as Exhibit B.

xxx (Delivery instructions received and marked Third Party Defendant's Exhibit B in evidence.)

Q Sir, in addition to the documents which you have identified, specifically the dock receipt, the bill of lading which you said you typed out and the delivery instructions, what other documents do you prepare before a shipment is delivered?

A Export declaration.

Q Do you have an export declaration there, please, sir?

A Yes.

(Handing.)

MR. DALEY: I will have this marked as Third Party Defendant's Exhibit C.

MR. KOCHENDORFER: No objection.

THE MAGISTRATE: It may be received as Exhibit C.

xxx (Export declaration received and marked Third Party Defendant's Exhibit C in evidence.)

MR. KOCHENDORFER: Your Honor, could I just ask at this time, is Mr. Daley cross-examining the witness or is he using him as his own witness under the subpoena?

THE MAGISTRATE: I don't think it makes any distinction under the new rules of evidence.

MR. KOCHENDORFER: The reason I am inquiring is he has the subpoena outstanding, and if he finishes with him under the subpoena, when he is done --

THE MAGISTRATE: All right. We will assume that he is going to get as much from this witness at this time as he needs and when the witness is concluded he can leave, unless Mr. Daley states to the contrary.

MR. DALEY: No. I have already informed Mr. Kochendorfer, the only reason I subpoenaed the witness was that I would be assured of getting his complete file.

MR. KOCHENDORFER: All right.

THE MAGISTRATE: We will take a five-minute recess.

(Recess.)

THE MAGISTRATE: All right.

BY MR. DALEY:

Q Mr. Catania, are there any other documents which you have in your file which designate the carrying vessel as the S.A. MORGENSTER?

What is that document right there, sir?

A This is the intermodal export master.

(Handing.)

MR. DALEY: I will have this as Third Party Defendant's Exhibit D.

MR. DE ORCHIS: I have no objection.

THE MAGISTRATE: Mr. Kochendorfer?

MR. KOCHENDORFER: No objection.

xxx (Copy of intermodal export master received and marked Third Party Defendant's Exhibit D in evidence.)

Q Sir, I show you Third Party Defendant's Exhibits A, B, C and D, which you have identified and which have been marked into evidence.

(Handing.)

On each of those documents, it is a fair statement that the carrying vessel on each and every one of those documents is identified as the S.A. MORGENSTER?

A Yes.

Q Sir, in relation to Plaintiff's Exhibit Number 7 that was marked in evidence, when that document was originally prepared by you, what was designated as the carrying vessel?

A The MORGENSTER.

Q Was it changed at a later date? Is there a stamp over the MORGENSTER?

A Yes.

Q When did you book this cargo aboard the S.A. MORGENSTER; the date?

A My records don't reflect the exact date.

It would have been at least prior to the 12th of March.

Q Prior to the 12th?

A Yes.

Q That you booked it aboard the MORGENSTER?

A Yes.

Q What day was the dock receipt issued?

A It would have been the same day.

Q Which is what, March 13th?

A I would say March 12th.

Q And the dock receipt was issued or the one that you got was issued or marked by ITO as March 13th; is that correct?

A Yes, correct.

Q Sir, do you have a bill of lading, a non-negotiable copy of the bill of lading, in your possession?

A Yes, I do.

Q May I please see a copy of that, please?

A Yes.

(Handing.)

Q Sir, are you familiar with the issuance of a bill of lading by an ocean carrier?

A Yes.

Q What documents do you have to present to the ocean carrier in order to receive an executed bill of lading?

A Just the bills of lading. I don't --

Q You don't have to give them a dock receipt to show them that somebody received it?

A They would have a copy of the dock receipt.

Q So you just go there with your bills of lading; is that correct?

A No. There was a dock receipt.

Q Okay. That is what I am asking you.

You go with a dock receipt?

A Yes.

Q And you have already prepared these bills of lading; is that correct?

A Yes.

Q You go up to the bill of lading clerk; is that correct?

A The bills of lading are sent to the bill of lading clerk.

Q Does somebody in your employ take them to the bill of lading clerk?

A We have a messenger service that does that.

Q Are you familiar with the procedures of after the bill of lading clerk sees a copy of the dock receipt -- am I right?

A Yes.

Q And he sees that it has been received on the pier --

A Yes.

Q Does he then put the bill of lading into some type of machine and make perforations?

A Yes, he does.

Q You have identified this as a copy of the nonnegotiable bill of lading; is that correct?

(Handing.)

A Yes.

MR. DALEY: I will have that marked as Third Party Defendant's Exhibit E.

MR. DE ORCHIS: No objection.

MR. KOCHENDORFER: No objection.

xxx (Copy of nonnegotiable bill of lading received and marked Third Party Defendant's Exhibit E in evidence.)

Q Sir, on Third Party Defendant's Exhibit E, can you tell me if there are any perforations on that document which state the date that this document was perforated by the steamship company?

A March 15, 1974.

Q And is the bill of lading number given?

A Bill of lading Number 66.

Q So March 15th is the date that your

messenger presented your copies of the bill of lading to the steamship company?

MR. DE ORCHIS: Objection, your Honor. I don't think the witness is qualified. He didn't take the document there himself.

If we want to establish what the perforation says, that is one thing.

THE MAGISTRATE: Sustained.

Q When did your messenger, or whatever he was, return the copies of the bill of lading to you?

MR. DE ORCHIS: The witness has already testified after the ship sailed.

MR. DALEY: I am asking him a specific date.

THE MAGISTRATE: Can you give us a date? Do you have any records from which that can be established?

THE WITNESS: Someone has my copy of the invoice, the one of Copeland Shipping.

(Pause.)

A My records don't indicate the exact date I received it back.

Q But does your messenger leave the bill of lading there and you receive it at a later date?

A Yes.

Q I show you what has been marked as Third Party Defendant's Exhibit A and what has been marked as Third Party Defendant's Exhibit E, and ask you, is there any difference between those two bills of lading as to vessel, as to anything?

(Handing.)

A The name of the vessel has been changed.

Q The name of the vessel has been changed?

A Yes.

Q Do you know the date the name of the vessel was changed?

A No, I do not.

Q All that you know is that when you received back the bills of lading from the ocean carrier, it was changed from the MORGENSTER to the NEDERBURG; is that correct?

A Correct.

Q Sir, I show you this document, and ask if you will hold it, more or less, and examine all three of them together.

(Handing.)

Is there some addition on the last document which I handed you, which was Plaintiff's Exhibit Number 1, is there no additional information on that document?

A It also reads the NEDERBURG, received on board March 22nd. The perforation on the bottom, South African Marine.

Q Would it be fair to say, sir, since there is a stamp by South African Marine that it was received on board on March 22, 1974 that you received this document after that date?

A Yes.

Q Sir, in relation to the freight bill, the green exhibit, Plaintiff's Exhibit Number 7, you have [illegible] on that document or there is a notation on that [illegible]cument "Paid 3/22"; is that correct?

A Yes.

Q Would you have to pay the ocean freight before you received the bills of lading?

A In this case, yes.

Q You would have to?

A Yes.

Q Did you ever contact anybody in the employ of ITO whether or not this shipment did go forward on the NEDERBURG?

A Not me personally, no.

Q Did you ever contact anybody in South

African Marine whether or not this shipment had gone forward on the NEDERBURG or MORGENSTER?

A Not to my knowledge, no.

Q Sir, would it be fair to say that the first notification you got that this shipment was not on board the MORGENSTER is when you received the bills of lading back from South African Marine?

A Correct.

MR. DALEY: That's all I have, your Honor.

THE MAGISTRATE: Redirect.

MR. KOCHENDORFER: Yes, sir.

REDIRECT EXAMINATION

BY MR. KOCHENDORFER:

Q You have been discussing the name of the vessel which is placed on the documents which you prepared.

Where does that name come from? How do you make that selection?

A We book space or reserve it with the steamship company before sending the freight down.

Q Did you ask that it be booked on the MORGENSTER?

A I really don't know in this case. Sometimes we request a ship, sometimes we don't or sometimes we just ask what is the next ship available.

Q Is it required that you put a name of a vessel on the documents before the items go to the pier?

A Yes.

Q And whose requirement is that?

A Mostly the steamships themselves. Most of them will not accept unless it shows a vessel.

Q And in this case, did it matter to you what the name of the vessel was?

A No, no.

Q Were you concerned that they changed the name from the MORGENSTER to the NEDERBURG?

A Not really.

THE MAGISTRATE: Wait a minute, counsel. It isn't the fact that they changed the name.

You mean was he concerned that they changed the vessel and shipped it apparently on a different vessel.

MR. KOCHENDORFER: That he received a document back with a different name on it.

THE MAGISTRATE: That indicated that it had been shipped on a different vessel. That is of more importance than the fact that they changed the name.

Were you concerned over the fact that according to the bill of lading the shipment had gone forward on a different vessel than the vessel you had originally booked it aboard?

THE WITNESS: No, sir.

Q Was there any requirement from the bank that the bill of lading that you have have a particular vessel?

A No.

MR. KOCHENDORFER: That's all the questions I have.

THE MAGISTRATE: I have one question for you, Mr. Catania.

You say you prepared a dock receipt for the stevedores to acknowledge receipt of the goods from your trucker, you didn't weigh the goods going out.

Does the dock receipt contain a declaration of the weight of the documents being transmitted to the pier?

THE WITNESS: Yes.

THE MAGISTRATE: Were any exceptions taken to the weight set forth by the stevedore upon receipt of the dock receipt and the goods?

THE WITNESS: No, there was none notated.

THE MAGISTRATE: What weight is shown in the dock receipt as having been delivered to the pier?

THE WITNESS: 4,512 pounds.

THE MAGISTRATE: Is that the same weight that the inland bill of lading declared?

THE WITNESS: Yes, sir.

MR. DALEY: I just have another, unless you want to go first, Mr. DeOrchis.

RECROSS-EXAMINATION

BY MR. DE ORCHIS:

Q Mr. Catania, this shipment wasn't freighted on a weight basis, was it?

A No. It was freighted by cube, as I see it.

Q So it would be the measurement of the boxes rather than the weight that would control how much you were going to get charged for your freight?

A Yes.

Q Does the document, the dock receipt, does it show what the cube was, what the measurement was?

A The dock receipt shows 381 cubic feet.

Q And who made that measurement of 381 cubic feet?

A That is put on a computer.

Q And this weight that is typewritten in there, that is a weight that you put on there?

A We put the weight on there.

Q As to the ocean leg of this voyage, it didn't make any difference, the weight, as far as your freight was concerned?

A No.

THE MAGISTRATE: Do you know if that measurement of 381, which I assume is cubic feet --

THE WITNESS: Yes, sir.

THE MAGISTRATE: -- is the same measurement as was present during the inland portions of the shipment, or can you not tell?

THE WITNESS: To the best of our knowledge, it would have been the same.

THE MAGISTRATE: What do you base that on?

THE WITNESS: The dimensions on the commercial invoices of each piece.

THE MAGISTRATE: Those dimensions seem to equal out to that volume?

THE WITNESS: Yes.

THE MAGISTRATE: So that while the

stevedore did not weigh the goods delivered, they apparently measured them for total volume and recorded that on the dock receipt and the volume received measures the same as that received by you during the inland shipment?

THE WITNESS: Yes, sir.

Q Mr. Catania, you said you don't have any knowledge of what happened to this shipment from the time it left Florida until it arrived at your plant in New York.

A Correct.

Q And during the time it was in your plant in New York, this would not have been under your personal supervision, this particular crate? You are not the man watching that crate while it is in your plant, am I correct?

A Not personally, no.

Q When it left your plant, you said it left on March the 12th from a plant in Queens.

A Yes.

Q And it did not arrive at the pier until the following day, am I right?

A Correct.

Q Do you have any explanation why it took

24 hours to get from Queens to the pier?

MR. KOCHENDORFER: I don't think the record reflects 24 hours.

THE MAGISTRATE: No. It merely reflects on one day and arrived on the next. We don't know the hours.

MR. DE ORCHIS: It arrived at 8:03 according to the ITO stamp on the dock receipt.

Q Do you know what happened between your warehouse and the pier?

A Would you like me to tell you what my trucker tells me? Is that what you want to know?

Q Did your trucker tell you something about this particular shipment?

A No, not this particular shipment. He tells me on all shipments that if I want to make delivery, I have to give him the freight the day before.

Q All right. So you give him the day before so he can be there the first thing in the morning?

THE MAGISTRATE: The witness has nodded his head.

You must speak up.

THE WITNESS: Yes, yes. I'm sorry. Yes.

Q When you say you booked the shipment on the MORGENSTER, did you do that personally?

A No, I did not.

Q Is there a booking note in your file that shows it was the MORGENSTER you booked on?

There isn't, is there?

A No, there is not.

Q If the cargo had not gone forward on the MORGENSTER, in the normal course of business, would the carrier notify you that your shipment had been shut out from the MORGENSTER?

A Occasionally they do. Very rarely.

Q Suppose only part of your shipment had gone on the MORGENSTER, suppose only half of it had gone and half was shut out and remained in New York, would they call you to notify you about that?

A No.

Q So it doesn't really make any difference to you whether this would have gone forward on the MORGENSTER or the NEDERBURG, am I correct?

A Correct.

Q The letter of credit, you weren't even going to present those documents until the following month?

A Correct.

Q And South African has a regular service to this port?

A As far as we know, yes.

Q So if it is shut out on one vessel, it gets on the next vessel?

A Yes.

RECROSS-EXAMINATION

BY MR. DALEY:

Q Sir, do you or anybody in your employ ever take the cubic measurements themselves of the various cases you receive?

A Yes.

Q Did you do it in this case?

A I really couldn't say for sure.

Q Would it be fair to say, sir, that the cubic measurements and the weights of the various cases are merely information passed to you from the shipper and you just copy everything down they say?

A Again, it depends on the shipment itself.

Q Do you know what happened with this shipment?

A No, I couldn't honestly say.

THE MAGISTRATE: Awe you clear, however,

that the insertion on the dock receipt, which is apparently penciled in or else a carbon off an ink, but at any rate it is handwritten in and not typed as the rest of the dock receipt, that this is an insertion made by the stevedoring company and not by your driver?

THE WITNESS: Yes, sir.

Q Sir, in relation to that dock receipt, that dock receipt was prepared or the typewritten portion of that dock receipt was prepared by you; is that correct?

A Correct.

Q Would it be fair to say that when you deliver that to a stevedore, that is your instructions to the stevedore based upon what the steamship company told you at the time of booking to load this cargo aboard the MORGENSTER?

A Yes.

MR. KOCHENDORFER: I think the witness has already testified to that aspect and he said he has to have a name on there for them to receive it.

MR. DALEY: Would the record reflect that the witness has answered the question in the affirmative.

That's all I have, your Honor.

THE MAGISTRATE: You are excused, Mr. Catania.

Will you be careful to leave with us any documents that have been admitted in evidence and gather up documents which were not.

(Witness excused.)

THE MAGISTRATE: Call your next witness.

MR. KOCHENDORFER: Your Honor, at this point, the plaintiff rests.

MR. DE ORCHIS: Shall we make our motions now, your Honor?

THE MAGISTRATE: I am going to reserve on your motion. You can make it if you want.

I don't want you to argue, however.

MR. DE ORCHIS: Then just for the record, may I state that the defendant will move in I assume now in its papers after trial that the plaintiff's case should have been dismissed when the plaintiff rested on the grounds that there has been no proof that Elgie Company has an interest in the shipment, on the grounds that there is no proof that the grinder or generator was actually shipped, on the grounds that the actual party in interest here was --

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THE MAGISTRATE: I don't think that the plaintiff is arguing that it was shipped. Indeed, I think the plaintiff's position is that it didn't get shipped.

MR. DE ORCHIS: My argument is that there is no proof that it was ever delivered to us, the ocean carrier; that there was no proof that inside this crate there was the goods --

THE MAGISTRATE: I understand that argument.

MR. DE ORCHIS: Because all we gave a receipt for was a crate in apparent good order and condition, and I think it is fatal in his case not to have proven the actual contents.

The other is we have testimony now from his own witnesses that the insurance, the ocean freight, the inland freight, everything was paid for by Shuron, the shipper, and it was CIF Durban, it wasn't CIF New York, and the only evidence we have that Durban -- I mean, that the consignee ever paid for this was a witness who was not even employed by the company at the time who makes the blank statement, "Yes, it must have been paid.

"How was it paid?

"By the letter of credit."

gtlm

The letter of credit I showed to that witness, I now showed it to this witness, they both said yes, that was the letter of credit.

As your Honor can see, the letter of credit had expired months ago, so it couldn't have been used to pay for this shipment.

THE MAGISTRATE: The accreditor is shown as Elgie & Company.

MR. DE ORCHIS: Yes.

My point is that this letter of credit was never used to pay for the shipment and could not have been used to pay for the shipment because it is an outdated letter of credit.

If they paid for it, which I doubt very much, it would have been done by check, not by this letter of credit. It was no good.

THE MAGISTRATE: I think the witness testified, in fact, however, that payment was made pursuant to this letter of credit.

MR. DE ORCHIS: And I asked him how, and he said this letter of credit.

But the witnesses can't be right, because this letter of credit is dead at the time this shipment is made.

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THE MAGISTRATE: What it does say is, "Unless previously exhausted, this credit shall cease to be available for negotiations of beneficiary's drafts after 7th January, 1974."

So I agree with you on the face of it it would appear to be a dormant letter of credit.

On the other hand, the witness testified that, in fact, it was honored.

However, this is a matter of argument that I don't want to hear at this time.

MR. DALEY: On behalf of the third party defendant ITO, I join in Mr. DeOrchis' motion.

MR. KOCHENDORFER: Your Honor, the sight draft was presented and went along with that letter of credit which the Barclays Bank had indicated it was paid against that.

Also I wanted to say as far as the question of the sale, I think that the documents of sale and the negotiation against the letter of credit which was for Elgie & Company's account reflect that Elgie was, in fact, the owner of the cargo and paid for it.

THE MAGISTRATE: May I see the sight draft again, please?

MR. DALEY: Yes.

(Handing.)

(Pause.)

THE MAGISTRATE: I do note that both the sight draft and the letter of credit bear Number FB1396, so the sight draft is indicating that payment was made pursuant to this letter of credit.

Whether or not there was a formal extension of the letter of credit or not is something else.

MR. KOCHENDORFER: Your Honor, when the letter of credit was marked, the extention to the letter of credit was not included with the letter of credit.

(Handing.)

THE MAGISTRATE: You are now offering this document to cure --

MR. KOCHENDORFER: I assumed that was part of the letter of credit, your Honor.

I am sorry I didn't check the document which was submitted by Mr. DeOrchis at this time.

THE MAGISTRATE: It is not part of what he submitted nor is it part of what you submitted on the deposition.

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Are you now offering it?

MR. KOCHENDORFER: I will offer it in evidence, your Honor.

MR. DE ORCHIS: Had I known that, your Honor, I wouldn't have made the point.

He is reopening his case now for the --

MR. KOCHENDORFER: No, I am not reopening my case. I am just offering an explanation as to the letter of credit and why --

THE MAGISTRATE: Do you want to withdraw this technical point, Mr. DeOrchis?

MR. DE ORCHIS: If he doesn't want to reopen the case, I don't want to withdraw my point.

MR. KOCHENDORFER: I will offer to reopen.

THE MAGISTRATE: All right. It is reopened and the document is offered.

Is there any objection to it?

MR. DE ORCHIS: Yes, I will object to it, for the record.

THE MAGISTRATE: On what grounds?

MR. DE ORCHIS: On the grounds that the plaintiff had rested and had this document in his hands all this time and he has led me to believe all through this case that we were dealing with an

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expired letter of credit, including at the deposition and including at the presentation of his direct case this morning.

MR. KOCHENDORFER: I think Mr. DeOrchis is well aware that letters of cred[illegible] are extended, and whether that particular one didn't comment on the extension, the bank could have accepted any letter of credit they wanted to accept, and the testimony was that they did accept.

Whether or not that is attached or not --

THE MAGISTRATE: Have you been prejudiced, Mr. DeOrchis, by this previous nonrevelation of the extension of the letter of credit?

MR. DE ORCHIS: Only to the extent of the legal services my client is going to have to pay for that, for the research I did for the period of time that he had me misled.

I don't really think that is an important point. What is the important point is that he claims this case was never loaded on the ship and he can't have it both ways. If it was never loaded on the ship in New York, then the plaintiff Elgie did not own the case as of that date, it was owned by the shipper.

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THE MAGISTRATE: Why not if they, in fact, had paid for it and paid for the cost of shipping it?

Suppose it was just sitting on the pier in New York, had never gotten lost and everybody knew where it was, once the letter of credit is paid, does not the case belong to Elgie?

MR. DE ORCHIS: No. Title passes at CIF Durban.

If the case was lost in New York, Shuron takes the loss and replaces it, which, in fact, they did replace this case.

MR. KOCHENDORFER: Your Honor, I would like to point out, I think Mr. DeOrchis is confusing the issues. CIF indicates only when a risk passes and not when title passes. Title passes when they paid for it.

THE MAGISTRATE: You are both doing exactly what I wanted to avoid, namely, arguing the merits of this. I am reserving decision.

As to the document being offered, I haven't heard from you, Mr. Daley, whether you have any objections to it.

MR. DALEY: No, I have no objections to it.

THE MAGISTRATE: All right. And you have

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no objection other than the one you have stated, Mr. DeOrchis?

MR. DE ORCHIS: That's correct, your Honor.

THE MAGISTRATE: As to the one stated, I overrule your objection, and it may be received in evidence.

Are you adding it to the exhibit?

MR. KOCHENDORFER: I would just like to add it in both instances to the letter of credit which was an exhibit as part of the letter of credit.

THE MAGISTRATE: You can't do it in both instances, we only have one copy of it.

Where do you want to add it?

I am adding it for you to the deposition exhibit.

MR. KOCHENDORFER: All right.

THE MAGISTRATE: Because I have a suspicion if Mr. DeOrchis had known that that document had existed, he might not have offered Exhibit A.

MR. DE ORCHIS: That's correct.

THE MAGISTRATE: So we won't stick him with your omission, we will add it to the deposition exhibit.

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MR. KOCHENDORFER: Thank you.

MR. DE ORCHIS: May we have a stipulation that the documents were presented to the bank and the letter of credit was negotiated on April 17, 1974?

THE MAGISTRATE: The sight draft shows April 16th.

MR. DE ORCHIS: I will accept April 16th. That is the date that title would have passed at the earliest.

THE MAGISTRATE: We now have another extension of the time.

I gather you are offering both of them, and I gather you are making the same objection, Mr. DeOrchis, and I am overruling the same objection, and we will mark them both as supplements to the exhibit submitted with the transcript, these being extensions of the letter of credit.

The letter of credit itself is deposition exhibit --

MR. DE ORCHIS: It was part of Exhibit D at the deposition.

THE MAGISTRATE: All right. These two will be marked as deposition exhibit supplements

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A and B.

Physically mark them D-1 and D-2 and I will attach them.

The defendant may call its first witness.

MR. DE ORCHIS: We will call Captain Palmer.

JAMES CYRIL PALMER, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DE ORCHIS:

Q Mr. Palmer, by whom are you employed?

A South African Marine Corporation.

Q How long have you been employed by that corporation?

A Ten years.

Q What was your position with the corporation in March of 1974?

A Marine superintendent.

Q What are the duties, generally, of a marine superintendent?

A Operation of the vessels on the coast, our own and chartered vessels; storing, any problems that might arise from a ship's point of view.

Q In March of 1974, where did the corporation have piers or use piers in New York?

A Brooklyn Army Base.

Q Was the pier or the terminal owned or operated by the ocean carrier?

A No, sir.

Q Who was the terminal operator at that pier at the Brooklyn Army Base?

A International Terminal Operating.

Q Who were the stevedores at that terminal?

A The same, International Terminal Operating.

Q ITO was both the terminal operators and the stevedores?

A Right.

Q Are you familiar with the operation of that terminal?

A Oh, yes. I had been there three years.

Q Were you there in March of 1974?

A Yes.

Q Who receives the cargo that arrives at the pier? By that I mean, what company? Is it the ocean carrier or is it ITO?

A It's ITO.

Q And who has care and custody of the cargo while it remains in the terminal?

MR. DALEY: I object, your Honor. This and the last question, they are all conclusions of law or questions of law.

A ITO.

THE MAGISTRATE: I don't know that this is really -- it connotes some legal aspects to it, but I am not treating it in the legal sense, we are treating it in the physical custody sense of --

MR. DE ORCHIS: That is the way the questions were asked.

THE MAGISTRATE: I think if you were talking from a bailment standpoint, it would get a little more complicated.

All right.

You have been asked, and I think you have already answered, that the cargo is received by the employees of the terminal operator and kept on premises owned by the terminal operator; is that correct?

THE WITNESS: Correct.

THE MAGISTRATE: Do you rent space on that terminal yourself for offices?

THE WITNESS: No -- yes, I do.

No, we don't rent, we use facilities that

ITO have on the terminal. We do not pay rent.

Q You have an office on the pier?

A Yes, I do.

Q And you are saying for that office that you use you don't pay separate rent for?

A To my knowledge, no. In fact, I'm sure we don't.

Q It is part of the services that ITO offers, this free office space?

A Correct.

Q But the terminal itself, the expanse of the pier, who has control of that?

A ITO.

MR. DALEY: I am going to object to that, your Honor.

Control as to what aspect?

Q Who handles the cargo on the pier as far as loading and discharging cargo?

A ITO.

Q Who receives the cargo when it is received at the pier? Whose personnel receives it?

A ITO.

Q When cargo is delivered from the pier to leaving the pier, who makes the deliveries of the cargo?

A ITO.

Q And at night when the cargo is on the pier, who is watching that cargo?

A ITO.

Q This pier, is it used exclusively by South African Marine or do other lines also use the same pier?

A Other lines use the pier as well.

Q At one time on the pier, might there be cargoes of different lines all waiting different ships?

A Yes.

Q Is that usual or unusual?

A Most common.

Q Whose job is it to keep the cargoes separate, that is, the cargoes that are South African Marine lines, separate from cargoes that are from other lines and going on other lines?

A The terminal operator, ITO.

Q Is there a specific place on the pier where they would put South African Marine cargo exclusively and not allow any other carrier to put cargo in that space, or do you share it in common?

A Share it in common, but they try to keep it in fairly reasonable order.

THE MAGISTRATE: How many ships does that pier accommodate?

THE WITNESS: I think you can get four on there, but I wouldn't -- I've never seen it myself.

THE MAGISTRATE: What is the most you have ever seen on the pier at once?

THE WITNESS: I would say two.

Q Do you have anything to do personally with the receipt of cargo on the pier?

A No, sir.

Q Are you notified when cargo or when a particular shipment has been received on the pier?

A Only in special cases, a special shipment that I might be looking for or a large shipment or a heavy lift or such like.

Q When cargoes are received on the pier, what kind of receipt is given by ITO to the person delivering cargo?

A As far as I know, just a dock receipt.

Q It is called a dock receipt?

A Yes, it is. It is a signed dock receipt.

Q Does the ocean carrier give any separate receipt other than a dock receipt?

A To my knowledge, no.

Q Is there anyone standing there at the place where delivery is made to the terminal, is there anyone standing there from the carrier?

A No.

Q Is the employee who gives the receipt, is he an employee of ITO?

A Yes.

Q After the cargo is received at the pier, is a measurement made of the cargo?

A There should be.

Q If the cargo is measured, who makes the measurement?

A ITO, their personnel.

Q If the cargo is measured, is a notation made somewhere of that measurement?

A Usually on the back of the dock receipt.

Q When cargo is received and there is more than one package, are the packages tallied?

A Yes.

Q And if a tally is made, where is that noted?

A On the back of the dock receipt.

Q I show you this document and ask you if you can identify it.

(Handing.)

A This is a dock receipt.

MR. DE ORCHIS: I offer in evidence our copy of the dock receipt.

MR. DALEY: I am going to --

THE MAGISTRATE: I take it it differs from the copy of the dock receipt already in evidence?

MR. DE ORCHIS: It has some notations which we will explain, but they put in their copy, we are putting in our copy.

MR. DALEY: Your Honor, I request a voir dire on this.

THE MAGISTRATE: Certainly. Go ahead.

MR. KOCHENDORFER: There are three copies, actually.

THE MAGISTRATE: You each have your own, I take it.

You better mark it for identification before you commence your voir dire.

It is Exhibit B, I believe.

xxx (Copy of dock receipt made March 13, 1974 marked Defendant's Exhibit B for identification.)

VOIR DIRE EXAMINATION

BY MR. DALEY:

Q Captain Palmer, when did you first see this dock receipt, or if you ever did see this dock receipt?

A I think Tuesday of this week in our attorney's office.

Q You never saw it before that date?

A Never.

Q You never had any involvement with that document before this date?

A Never.

Q I ask you to compare that document with this other document that has been marked as Plaintiff's Exhibit 4, and ask you if you can review those two documents and tell me if there is any difference between them.

(Handing.)

A Yes, a different ship.

Q Different ship?

A Yes.

Q Are there any numbers on the exhibit which has just been marked as Defendant's Exhibit B?

A There is some writing down here.

Q Who put that writing down there?

A I have no idea.

Q You don't have any idea?

A No.

MR. DE ORCHIS: If your Honor please, I explained that there are differences which we are going to explain by witnesses.

That writing is one of the other witness'.

MR. DALEY: Your Honor, as far as I am concerned, this witness is not competent to read from this document. He only saw it Tuesday when shown to him by his attorneys.

MR. DE ORCHIS: Are you raising any question that this is our copy of the dock receipt?

MR. DALEY: I don't know what -- yes, of course I am.

MR. DE ORCHIS: You are saying that is not our copy of your dock receipt?

MR. DALEY: That is correct. That is exactly my position.

I don't know what original form the dock receipt was when you received it and I don't know when those notations were put on there. I don't know when the name of the vessel was changed.

MR. DE ORCHIS: We have the other witnesses.

May I have the dock receipt, please.

DIRECT EXAMINATION CONT'D

BY MR. DE ORCHIS:

Q When cargo is received for one ship according to a dock receipt and the cargo is shut out from the first ship and is going to be put on the second ship and the name of the ship is going to be changed on the dock receipt, who has the rubber stamps with the names of the ships such as the one on this document?

A Our office has one.

Q And on the terminal, does anybody have one?

A They may well have. Yes, I think they possibly do have a stamp.

Q If cargoes are shut out from a ship, are you notified?

A No. I get a breakdown at the end stating tons and cube of what was shut out, not specifics.

Our office is notified.

Q Was there any cargo shut out from the MORGENSTER?

A Oh, yes.

Q The report you received would be in terms of tons --

A And cubes.

Q Not specific shipments?

A Correct.

Q Are tallies made at the time cargo is loaded aboard the ship as distinguished when cargo comes into a ship?

A Yes.

Q Who makes the vessel's stowage plan?

A The final plan?

Q The final plan.

A ITO. They have a plan clerk on the dock.

Q Where does a plan clerk get the information to be able to make up the stowage plan?

A I assume from his hatch tallies.

MR. KOCHENDORFER: At this point I would like to offer an objection to the witness giving any further testimony as to his assumptions as to how ITO operates on the pier. I think we have to wait for ITO to testify how they do operate on the pier.

THE MAGISTRATE: You have to assert that on an individual question basis.

MR. DALEY: Your Honor, I am going to object to him reading or in any way identifying this plan, because he said he assumed it was made up in a certain way, he didn't say he knows.

THE MAGISTRATE: The document hasn't even been marked for identification. Your objection is premature.

MR. DE ORCHIS: May I have the document marked for identification.

xxx (Stowage plan marked Defendant's Exhibit C for identification.)

BY MR. DE ORCHIS:

Q Can you identify that document?

A It is the stowage plan of the M.V. NEDERBURG, Voyage 28.

Q Did you have anything to do with the preparation of that document?

A No, sir, apart from -- excuse me -- apart from supplying the information from the outports.

Q From the outports?

A Yes.

Q What does that mean?

A From the ports prior to New York.

Q Notifying ITO what was already on board?

A Right, what was already on board the ship.

Q But other than that, you had nothing to do with the preparation of that stowage plan?

A No, sir.

Q Is every ship that sails from this pier, would it have a stowage plan made out similar to this?

A On our ships, yes.

Q Yes.

So is a stowage plan prepared in the regular course of business?

A Yes.

Q As far as your line is concerned?

A Yes. It is essential.

MR. DALEY: In the regular course of whose business?

MR. DE ORCHIS: In the regular course of our business.

MR. DALEY: Do you prepare this plan?

MR. DE ORCHIS: No. But you prepare it for us. That is what we pay you for it.

MR. DALEY: When was the first time the witness saw the plan?

THE MAGISTRATE: All right, Mr. Daley.

MR. DE ORCHIS: I will ask ITO to stipulate that this is your stowage plan.

You just said my witness knows nothing about it. I agree, my witness knows nothing about your stowage plan.

Is this your stowage plan?

A Excuse me, I didn't say I had never seen this plan before or a copy of this.

Q No.

A I did not prepare it.

Q Right.

MR. DE ORCHIS: May I have a stipulation that you prepared the stowage plan, your people?

MR. DALEY: Not that we prepared it. I will examine the plan and see if it conforms with my copy.

(Pause.)

MR. DALEY: I can't really read the voyage number on here.

MR. DE ORCHIS: Can we put yours in?

MR. DALEY: Yes, you can.

THE MAGISTRATE: Is there a concession that this is identical to the hatch plan prepared by ITO?

MR. DALEY: This is ITO's stowage plan.

THE MAGISTRATE: You are going to use yours?

MR. DALEY: Yes.

THE MAGISTRATE: You have no objection to yours, I take it.

MR. KOCHENDORFER: I would not disagree that it was the stowage plan prepared by ITO, but as to its contents, I would object to anything until ITO can testify as to the contents.

THE MAGISTRATE: The document is being offered now as a document kept in the regular course of its business. There is no testimony as to its accuracy or how it is prepared.

MR. DE ORCHIS: I agree with ITO's counsel that my witness would not be able to identify either the stowage plan or the dock receipt. I am just putting it in as the stowage plan which they now have stipulated is the stowage plan for the shipment in suit, and the only testimony from my witness was that it is in the regular course of business to prepare such stowage plans, and I offer it in evidence.

THE MAGISTRATE: All right. It will be marked as Defendant's Exhibit C, subject to impeaching evidence as to its accuracy.

xxx (Stowage plan received and marked Defendant's Exhibit C in evidence.)

BY MR. DE ORCHIS:

Q Captain, how does ITO know what shipments it is going to load onto a particular vessel?

A If it is received for that vessel, unless otherwise instructed, it should be loaded on that vessel.

Q How would they know if it is received for a particular vessel?

A By the dock receipt.

Q So they follow the dock receipts?

A Yes.

Q If cargo is shut out, do you know what record is made of that?

A They keep the dock receipts aside that are shut out.

Q And what do they do with those dock receipts that are shut out dock receipts?

A When the ship is completed, they send the dock receipts to the office.

Q As I understand it, you have nothing to do with the receiving of the cargo?

A No, sir.

Q You have nothing to do with the making of the stowage plan?

A No, sir.

Q You don't direct the stevedores on loading and discharging the ships?

A I preplan a stow just prior to the vessel's arrival.

Q What do you mean by preplan?

A I have a blank plan with what is in the vessel and I allocate port spaces.

Q Like you might allocate space for Durban?

A Space for Durban, East London and so on.

Q Who decides what Durban cargo will go in the different spaces that you have assigned for Durban on the preplan?

A Unless it is a very large lot of, say, 200 ton of drums or a heavy lift, the stevedore will pick his cargo which is compatible to that compartment.

MR. DE ORCHIS: I have no further questions.

THE MAGISTRATE: Cross-examination.

MR. KOCHENDORFER: I have no questions.

CROSS-EXAMINATION

BY MR. DALEY:

Q Captain Palmer, are you familiar with the shed at the Brooklyn Army terminal?

A Oh, yes.

Q In that shed, you have testified there are stowed various shipments for various steamship companies; is that correct?

A Correct.

Q Is the shed subdivided again into vessel and port and everything else like that?

A Yes.

Q So in other words, if you wanted to find the MORGENSTER cargo, you would go to one specific area of the shed?

A Correct.

Q And if you wanted to find the NEDERBURG, you would go to another area of the shed?

A Correct.

Q If you wanted to find the MORGENSTER Durban cargo, where would you go? Would that be another area of the shed?

A It would be in a specific spot, yes.

Q Do you know if there are any labels put on a shipment of cargo by ITO?

A Yes.

Q And what do those labels state?

A They have a port which is stamped on it -- is printed on it, the vessel and the dock receipt number.

Q It has the port of discharge; is that correct?

A Correct.

Q Is that made up from the initial dock receipt or the dock receipt?

When is it made up?

A When the cargo is received.

Q So in other words, on March 13th of 1974 when ITO received this shipment, they made up a little label to put on this cargo?

A Correct, yes.

Q And since the dock receipt that ITO has or that the trucker has says MORGENSTER, what would be the name of the vessel placed on that little label?

A MORGENSTER.

Q And what would be the port of discharge?

A Durban.

Q Do you get together with anybody in the employ of ITO to stow a ship?

A Yes.

Q And who would that be?

A Captain Beecham.

Q And you get together with Captain Beecham and discuss how a ship is going to be loaded?

A Right.

Q Do you speak in general terms or specific terms?

A General.

Q Do you say, "I want this dock receipt loaded on this vessel in this space"?

A No.

Q Isn't it a fact that you say, for example, "I want six ton of Durban cargo on the MORGENSTER Number 6 tweendeck"?

A No. I say this cargo is allocated for Durban and I want it on there.

Q ITO would go along the shed and say, "They want six tons on the MORGENSTER," and they would put six ton on the MORGENSTER?

A Yes.

Q And would that be the normal course of business?

A Yes.

Q Who makes the final determination of how much cargo is to be loaded aboard a ship?

A I have the open space when the vessel arrives, tell our traffic department "This is how much we can take" and --

Q You tell your traffic department?

A Oh, yes.

Q Is that the same people that book cargo?

A Yes.

Q So you contact -- you get the other cargo plans from the outports?

A Right.

Q You find out how much cubic you have in the vessel?

A Right.

Q You tell your traffic department "I have 2300 cubic feet on board this vessel," all right.

Is your traffic department then supposed to book further cargo on this vessel after the 2300 are met?

A It's possible.

Q Are they supposed to?

A That I couldn't say.

Q I would assume that you as a marine superintendent wouldn't know anything about bills of lading, either, would you?

A No, sir.

Q Do you get orders to stop certain dock receipts on a pier?

A Once in a while.

Q Once in a while?

A Yes.

Q If you are going to shut out a ship --

A We put off a cutoff time.

Q Okay.

A Specific date, morning, afternoon, whatever it might be.

Q Was there cargo shut out of the MORGENSTER?

A Yes.

Q What was the cutoff time?

A I really couldn't remember.

Q You don't know?

A I don't remember.

THE MAGISTRATE: Do you know on what dates the MORGENSTER was loading?

THE WITNESS: I don't remember that, either, but --

THE MAGISTRATE: Do you know when it sailed?

THE WITNESS: I have the information over there.

She worked on March 14th, 15th by the looks of my reports.

Q March what?

A 14th and 15th.

Q Do you know when she sailed?

A I don't have that information.

Q You already testified that you don't know anything about the dock receipt, either? You know the general thing, but you don't know anything about this specific dock receipt?

A This specific one, no.

Q Let me ask you a question on the cargo stowage plan which everybody has stipulated to.

Does that specifically set forth each lot of cargo that is loaded aboard a vessel?

A I am sorry, I don't understand you.

Q You are looking at the cargo stowage plan for the NEDERBURG, Voyage 28, right?

A Yes.

Q Does that list bills of lading in the various spaces?

A No, sir.

Q Does it list dock receipt numbers?

A No, sir.

Q Does it list -- what does it list?

A Packages.

Q Just packages?

A It will say various things. Drums or bags of rice, you know.

Q Do you know who the shipper or the consignee is from the cargo stowage plan?

A No, sir.

Q Sir, I will show you another cargo stowage plan -- maybe Mr. DeOrchis would be willing to stipulate to this one, also.

Sir, I show you another document and ask if you can identify that document.

(Handing.)

A Yes. It looks like it is the stowage plan of the S.A. MORGENSTER.

I am sorry, I don't read the voyage here.

MR. DALEY: Will DeOrchis stipulate for the record that this is the voyage for March of 1974 when she loaded in New York?

MR. DE ORCHIS: If you say so.

THE MAGISTRATE: He says so.

MR. DALEY: I say so.

I will have this marked as Third Party Defendant's Exhibit F.

Does anybody have any objection to this?

MR. KOCHENDORFER: I would just make the same one.

I would accept it looks like a stowage plan, but I would wait for ITO to testify as to how it is made up.

THE MAGISTRATE: No objection as to relevancy?

MR. KOCHENDORFER: I haven't even seen what it is.

MR. DALEY: It is a stowage plan.

(Pause.)

MR. KOCHENDORFER: Mr. Daley, what is this purported to be?

MR. DALEY: The stowage plan for MORGENSTER for March of 1974.

MR. KOCHENDORFER: As represented by ITO?

MR. DALEY: I am just representing it as the stowage plan. This is an ITO stowage plan, that's correct.

MR. DE ORCHIS: That is what I stipulated to.

MR. DALEY: All right.

THE MAGISTRATE: Is this for a shipment on or after March 15th out of New York?

MR. DALEY: Yes, your Honor.

I believe the MORGENSTER sailed on the 16th.

While he is looking at that, let me ask you, Captain:

Based on the dock receipt which listed the cargo in question as being booked for the MORGENSTER, was it on the pier in time to be loaded on the MORGENSTER?

THE WITNESS: Yes.

THE MAGISTRATE: Do you have any knowledge as to why it was not loaded on the MORGENSTER if, in fact, it was not loaded on the MORGENSTER?

THE WITNESS: I would only say that probably the cutoff date was prior to its arrival.

THE MAGISTRATE: Do you know what the cutoff date was?

THE WITNESS: That I can't say.

THE MAGISTRATE: If it was loading on the 14th and 15th and if it sailed on the 16th, what would be the normal cutoff date for arrival?

THE WITNESS: They vary according to space available.

THE MAGISTRATE: Is a cutoff date based upon how much cargo the vessel is booked to carry, or is it based on lead time for loading aboard?

THE WITNESS: No, it is based on how much cargo the vessel can carry.

THE MAGISTRATE: So that at some given point you determined you had all the cargo that the MORGENSTER could take and then you effected a cutoff on further cargo?

THE WITNESS: That is correct.

THE MAGISTRATE: And you don't know what that date was?

THE WITNESS: No, sir.

MR. KOCHENDORFER: I would have to object to the plan, because I don't know where the information came from or any foundation for it.

THE MAGISTRATE: It is, I take it, a record kept in the normal course of business.

MR. KOCHENDORFER: Nobody has testified to that.

THE MAGISTRATE: That is your objection.

MR. KOCHENDORFER: I would like to have ITO testify.

THE MAGISTRATE: Subject to connection, then, you may ask questions, until such time as you properly identify it.

BY MR. DALEY:

Q Captain Palmer, will you please compare both of these documents.

Do both of these follow the same format as the stowage plan for a South African Marine vessel?

A Yes.

Q Do either one of those documents set forth bills of lading numbers?

A No, sir.

Q Do either one of those documents set forth dock receipts?

A No, sir.

Q Do either one of those documents set out lot numbers?

A No, sir.

THE MAGISTRATE: Of what value, then, are these cargo plans in telling us whose cargo was aboard which vessel?

MR. DALEY: It is steamship company practice, it is just arrangement of the cargo for ports of discharge so they know what space they have to discharge. It is just a general arrangement, it doesn't specifically list cargo.

THE MAGISTRATE: I have drawn cargo plans. I know what purpose they serve. Sometimes, however, you indicated what cargo is loaded where, not merely by port of destination, but by terms of what kind of cargo it is.

For example, at one point here it says "Bags of clay" and gives the number of bags of clay.

If you were dealing just with a crate said to contain a generator, you would probably say one crate.

Q Couldn't it slip under general cargo, also?

A Exactly, oh, yes.

THE MAGISTRATE: It seems to me, Mr. Daley, that what you are establishing is that the cargo plans are of no value whatever in telling us what, if any, of the questioned cargo went aboard either vessel.

MR. DALEY: That is correct, your Honor.

THE MAGISTRATE: That is what you are trying to establish.

MR. DALEY: That is correct, your Honor.

MR. DE ORCHIS: That is the same thing I was trying to establish.

MR. KOCHENDORFER: I will go along with that.

MR. DALEY: I just have a couple more

questions.

Q Captain Palmer, do you ever inspect the hatch tallies?

A No, sir.

Q You never look at them?

A No.

Q Did you ever request to look at them?

A I have -- no.

Q Do you know if the bill of lading department or anybody in South African Marine ever requested the hatch tallies so that they could find out what, in fact, was on board the ship?

A Yes, it has been done.

Q Has it been done in this case?

A To my knowledge, I couldn't say.

MR. DALEY: That's all I have right now.

MR. DE ORCHIS: No further questions.

THE MAGISTRATE: You are excused, Captain.

(Witness excused.)

THE MAGISTRATE: It is now a few minutes before one o'clock. I am hearing a motion during the lunch hour which may last a full hour. However, I would like you back at two o'clock, if possible, to continue.

(Luncheon recess.)

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AFTERNOON SESSION

2 p.m.

THE MAGISTRATE: All right, call your next witness.

MR. DALEY: Your Honor, before this, ITO was served with a subpoena regarding all hatch tallies for both the MORGENSTER and the NEDERBURG for March 1974.

I have been advised by counsel for the defendant South African Marine, who served the subpoena, that they will not need this witness.

I respectfully ask that this witness be excused.

THE MAGISTRATE: Do you have any objection?

MR. DE ORCHIS: No, I have no objection.

THE MAGISTRATE: He may be excused.

All right. Call your next witness.

MR. DE ORCHIS: Mr. Minutello.

JOHN MINUTELLO, called as a witness by the defendant and third party plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DE ORCHIS:

Q Mr. Minutello, by whom are you employed?

A South African Marine Corporation.

Q How long have you been employed by them?

A Nine years.

Q What was your position with the company in 1974?

A Documentation manager.

Q And what is your position now?

A Documentation manager.

Q Can you tell us what a documentation manager does in that company?

A Process all bills of lading and file export decks, handle any refunds or any problems. General documentation.

Q Can you tell us, how does the company first have information that certain cargo is going to be carried by one of the company vessels?

A By dock receipt.

Do you mean my department? I'm sorry.

Q Just generally the company.

A It would get a booking, I would assume, or -- yes, a booking. That would be the first knowledge that they would have.

THE MAGISTRATE: Off the record.

(Discussion off the record.)

THE MAGISTRATE: All right, go ahead.

BY MR. DE ORCHIS:

Q After the cargo is booked, how does the company know that the cargo has been received at the terminal?

A A signed dock receipt.

Q I show you this document and ask you if you can identify it.

(Handing.)

A Yes. It's a signed dock receipt.

Q Is that dock receipt the regular form used by South African Lines?

A No, it is not. It is not our dock receipt per se, but it is the same format.

Q Whose form is that?

A I have no idea.

Q Do freight forwarders sometimes use their own dock receipt forms?

A Yes, they do.

Q And are those acceptable in the trade?

A Yes.

Q The bills of lading, does South African Lines have both short form and long form bills of lading?

A Yes, they do.

Q Who decides whether the short form or the long form is used?

A It is up to the shipper or the forwarder.

Q I show you Plaintiff's Exhibit 1, and ask you whether that is the regular short form bill of lading, disregarding all the typing. I am just asking about the form.

A Yes, it is.

Q Is that the standard short form bill of lading used by South African Lines?

A Yes, sir.

Q I show you this document, and ask you if you can identify it.

(Handing.)

A This is the long form bill of lading.

Q Is that the regular standard long form bill of lading used by South African Lines?

A Yes, it is.

Q Is that the long form which is referred to in the short form?

A Yes.

MR. DE ORCHIS: I will offer the long form in evidence.

MR. KOCHENDORFER: The only question I have is whether this is the one that was in use at the time and on file with the Federal Maritime Commission.

Q Can you --

A Yes, to the best of my knowledge it was.

THE MAGISTRATE: That is March of 1974.

MR. KOCHENDORFER: Like on a voir dire here, was that the one that was on file with the Federal Maritime Commission, the long form bill of lading?

THE WITNESS: To the best of my knowledge, yes.

MR. KOCHENDORFER: If that is the case, I have no objection to it.

MR. DALEY: I have no objection to it.

THE MAGISTRATE: It may be received.

xxx (Long form bill of lading received and marked Defendant's Exhibit D in evidence.)

BY MR. DE ORCHIS:

Q Does South African Marine keep stocks of both the short form and long form available for the trade?

A Yes.

Q Are the freight forwarders able to obtain stocks of either the short form or long form for their business?

A Yes, they are.

Q The document which is the dock receipt before you now, can you tell us, did that dock receipt cover the shipment in question here?

I am asking you about the dock receipt.

MR. DALEY: Your Honor, I don't know if this man is dealing with personal knowledge or is he just dealing with documentation? What is he dealing with?

MR. DE ORCHIS: He is our documentation man. This is our dock receipt.

MR. DALEY: This is your dock receipt?

MR. DE ORCHIS: It is the dock receipt you sent us.

MR. DALEY: That is in the same form as I sent you?

MR. DE ORCHIS: Yes, exactly.

MR. DALEY: That yellow dock receipt that that man has in his hand is the exact same dock receipt I forwarded to you?

MR. DE ORCHIS: Except for -- except for writings on it that are going to be explained.

MR. DALEY: All right. Go ahead.

I withdraw the objection as of now, your Honor.

BY MR. DE ORCHIS:

Q Is that the dock receipt that covers the shipment in question?

A Yes, it is.

Q Does the dock receipt come from the files of South African Marine Lines?

A Yes, it does.

Q Are these dock receipts kept in the regular form of business?

A Yes.

Q And was this dock receipt kept in the regular form of business, the regular course of business?

A Yes.

MR. DE ORCHIS: I will offer this in evidence as one of our documents in evidence.

MR. DALEY: I will request a voir dire.

THE MAGISTRATE: If you prefer, we will accept it in evidence without the writings thereon and the changes thereon and let him develop that.

I assume that is your major objection to it.

MR. DALEY: Could I conduct a voir dire?

THE MAGISTRATE: If you want, go ahead.

VOIR DIRE EXAMINATION

BY MR. DALEY:

Q Mr. Minutello, you said that you received this document in the regular course of business; is that correct?

A Yes.

Q Is this document that I show you right now, is that the way you received it in the regular course of business?

A No, it is not.

Q Were there changes made on that document?

A Yes.

MR. DE ORCHIS: If your Honor please, that is the line of questioning I am opening. I don't see a voir dire for it. I am going to explain the changes.

If you are not satisfied, you can cross-examine.

MR. DALEY: Are you objecting to my voir dire?

MR. DE ORCHIS: Yes, because that is the information I want to bring out.

THE MAGISTRATE: He is not presently offering the document with the changes, he is excepting inked and penned in and handwritten additions for the moment.

MR. DALEY: I don't know what this man's personal knowledge is as to those things, your Honor.

THE MAGISTRATE: What you are cross-examining him about the fact is that there have been notations placed on the document after receipt.

MR. DALEY: That's correct.

THE MAGISTRATE: That hasn't been offered as yet.

MR. DALEY: Mr. DeOrchis just offered it in evidence, your Honor.

THE MAGISTRATE: And I said I would accept the document without the handwritten exceptions and additions.

MR. DALEY: All additions?

THE MAGISTRATE: All additions. He will have to testify as to them.

Do you understand what we are doing?

MR. DALEY: Yes, sir.

THE MAGISTRATE: The document may be received in evidence without the handwritten additions.

MR. DALEY: And all other additions, your Honor.

THE MAGISTRATE: Or stamped additions.

Is there anything aside from handwritten or stamped?

There are two stamped portions, one of which, I believe, was on there when it left you, namely, ITO and a date.

MR. DALEY: That is correct, your Honor.

THE MAGISTRATE: That stamp one you do not object to.

MR. DALEY: That is correct.

THE MAGISTRATE: The other stamp you object to?

MR. DALEY: I object to the stamp "NEDERBURG," I object to Number 66 on there and I object to the handwritten notations on it.

THE MAGISTRATE: All the handwritten notations and the S.A. NEDERBURG is not included in the present admitting of this document in evidence, but they may be subsequently added if the appropriate testimony merits it.

It has already been marked for

identification as Exhibit B, I believe.

Now it is in evidence except for the writings and the stamp NEDERBURG.

MR. DE ORCHIS: I have before me, your Honor, Plaintiff's Exhibit Number 4 for identification, which was a dock receipt put in by the plaintiff.

Is there any other dock receipt in evidence other than this Number 4?

MR. DALEY: Not as yet.

MR. DE ORCHIS: Then I call for ITO to give me their dock receipt.

MR. DALEY: You call for ITO?

MR. DE ORCHIS: Yes, your copy of the dock receipt.

MR. DALEY: On what ground?

MR. DE ORCHIS: I want to see his copy, my copy and your copy.

MR. DALEY: You want to see all copies of the dock receipt?

MR. DE ORCHIS: That is the idea.

MR. DALEY: All right.

(Handing.)

MR. DE ORCHIS: Thank you.

The document which Mr. Daley has just handed me I would like to have marked as the next exhibit for South African Line, being ITO's copy of the dock receipt.

THE MAGISTRATE: Are you offering it in evidence or for identification only?

MR. DE ORCHIS: No, in evidence.

THE MAGISTRATE: That will be Exhibit E.

Do you have any objection, Mr. Kochendorfer?

MR. KOCHENDORFER: I have no objection, sir.

THE MAGISTRATE: How about you, Mr. Daley, any objection to E?

MR. DALEY: I have no objection, your Honor.

THE MAGISTRATE: That will be marked as Exhibit E.

xxx (Defendant's Exhibit B for identification received in evidence.)

xxx (Dock receipt received and marked Defendant's Exhibit E in evidence.)

THE MAGISTRATE: When I said that Defendant's Exhibit B should be admitted in evidence without any of the handwriting additions, I think I should have distinguished the fact that there was one handwriting addition made prior to ITO sending it to the carrier, namely, the measurement number 381. So that is already in evidence. It appears on the dock receipt already submitted and it appears on this one.

MR. KOCHENDORFER: And the signature, your Honor.

THE MAGISTRATE: And the signature.

There is a signature on one, but there isn't any signature on another.

MR. DALEY: I believe there is a signature on another one that has already been marked in evidence. That is the trucker's copy or Copeland's copy.

THE MAGISTRATE: We now have ourselves a slightly confused record.

Let me have all three in front of me and let us see if we cannot clear up the record.

Defendant's Exhibit B and Defendant's Exhibit E and Plaintiff's Exhibit 4 are all copies of the dock receipt which, for identification purposes, in its lower left-hand corner has a form number "Warehouse Number 0846."

All three of them bear certain typed and what appear to be carbon copies. None of them appear to be the ribbon copy, but I could be wrong in that regard if they were using a very dull ribbon, with material filled in the form.

Two of the exhibits, namely, B and 4, have an ITO receipt stamp. Those same two exhibits have a receiving clerk's signature.

All three of them have a handwritten measurement number 381, which appears to be on at least two copies, carbon.

Exhibit E has a receipt stamp from somebody's insurance department.

Exhibit E also has a check mark in a box right above where it says "Only Clean Dock Receipt Accepted."

Exhibit 4 has a number 5 written in ink in the upper corner, which I think may have had something to do with an exhibit number at sometime.

Does anybody know?

MR. DE ORCHIS: No.

THE MAGISTRATE: Ink in the upper left-hand corner indicating a 5.

Exhibit B has several additional handwritten notations, one additional stamped notation.

The back side of Exhibit 4 is blank,

except for printed material, which is not completed.

The back side of the other two exhibits has some handwritten entries, one of which appears to be a carbon of the other.

Exhibit E has a stamp of ITO and a date on the back, the others do not.

I think I have described the differences between the three documents which at one time supposedly were all identical, except for the additions made to Exhibit B.

MR. DE ORCHIS: Thank you, your Honor.

THE MAGISTRATE: Have we clarified the record? Is there any further clarification necessary?

MR. DE ORCHIS: I will have the witness now try to explain some of the differences.

The exhibit which was offered by the plaintiff, which is Exhibit Number 4, can we stipulate that this was the copy given to the shipper's trucker?

MR. DALEY: This is a copy or this is the original that was given to the trucker. We don't know.

MR. DE ORCHIS: By copy, I mean it was the dock receipt given to the shipper's trucker.

MR. DALEY: That's correct.

MR. KOCHENDORFER: That is agreed.

DIRECT EXAMINATION CONT'D

BY MR. DE ORCHIS:

Q The two remaining, one is the ITO copy, which is this copy, which has been marked as Defendant's Exhibit E, and the other copy, which has been marked as Defendant's Exhibit B, that is, Defendant South African Lines' Exhibit B, is the carrier's copy.

Will you please turn both copies over.

Can you explain to us what that writing is on the back?

A It appears to be the checker, when he received the cargo, he signed for 12 pieces, it appears to be the checker's name and the date.

Q What does the circle with a 12 in the middle of it mean?

A That would indicate the total amount of pieces.

THE MAGISTRATE: By checker, do you mean the checker aboard the vessel or the checker on the pier?

THE WITNESS: At the pier. I'm sorry.

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Q That would be ITO's checker?

A Yes.

MR. DE ORCHIS: Can we stipulate that the writing in back of the dock receipt is the tally made by the ITO checker when the shipment was received on the pier?

MR. DALEY: Yes.

THE MAGISTRATE: So stipulated.

Q Please turn to the face side again.

On the lower right-hand corner of the carrier's copy of the dock receipt and also on the shipper's copy of the dock receipt, which was Plaintiff's Exhibit Number 4, there appears a signature on each one.

MR. DE ORCHIS: Can we stipulate that that signature is the signature of an ITO employee?

MR. DALEY: Yes.

MR. KOCHENDORFER: I would go along with that. I don't know.

THE MAGISTRATE: Can we read the name at all?

THE WITNESS: Yes. It is W. King.

Q Do you know who W. King is?

A He is one of -- or the assisting receiving

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clerk, but he is in the receiving department at the pier.

Q Whose receiving department?

A ITO.

Q Looking again at the carrier's receipt and at ITO's copy of the receipt -- let us set aside for the moment the shipper's copy -- there is some writing on the left-hand side just below the middle of the page.

Do you see that writing? It appears on the carrier's receipt but does not appear on ITO's receipt.

Can you tell us whose writing that is?

A That's the writing of our claims manager, Jerry Casta.

Q Comparing again the dock receipt of ITO with our copy of the dock receipt, on ITO's copy typewritten is the name of a ship the MORGENSTER.

Do you see that?

A Yes.

Q On our copy, the carrier's copy of the dock receipt, the MORGENSTER typing has been overstamped with a rubber stamp saying the NEDERBURG.

Can you tell us who made that change?

A The documentation department.

Q That would be your department?

A Yes.

Q Would you tell us how that came about that that change was made?

A Well, sometime after the MORGENSTER sailed, we received an envelope from ITO or the receiving clerk at the pier, a brown envelope, stating that the contents were MORGENSTER dock receipts shut out.

We opened the envelope, broke it down according to port, discharge port order, and made a notation of all the cargo that was shut out according to the information on the envelope.

Q Do you have that notation now that was made? Did you make a list of some kind?

A Yes, I made a list.

Q Do you have that now?

A I believe you have the list.

Q We have it?

A That is it.

Q I show you this document, and ask you if you can identify it.

(Handing.)

A Yes. This is prepared by me.

Q This was prepared by you?

A Yes.

Q What is it?

A It is a list of the MORGENSTER dock receipts that were loaded in partial, in other words, not the complete dock receipt was left behind.

THE MAGISTRATE: Wait a second.

You don't mean what you are saying.

MR. DE ORCHIS: Yes, he does, your Honor.

THE MAGISTRATE: No. He said not the complete dock receipt was left behind.

I think he means not the complete cargo listed on the dock receipt.

MR. DE ORCHIS: Correct. Correct.

THE WITNESS: I'm sorry.

Q This list is a list of those shipments where part of the shipment was left behind; is that correct?

A That's correct.

Q Is the shipment in suit, the one that is involved in this litigation, is it listed on that list?

A No, it is not.

Q What is the document attached to that list?

A It is a sample of one of the dock receipts that this list refers to.

Q How does that document indicate that part of a shipment was shut out?

A There was a notation written on the dock receipt that so many pieces and the weight and the measurement were still on the dock.

Q To make the record clear, the dock receipt you are looking at now is not the dock receipt covering the shipment in suit?

A No, it is not.

Q It is just a sample of what is done when part of a shipment is shut out?

A That's correct.

Q And would you tell us or would you read the words that indicate that part of a shipment was shut out.

A It is eight pieces, 1600 pounds, 78 cubic feet equal the MORGENSTER, and I have three pieces, 1616 pounds, 19 feet NEDERBURG.

Q And what does that notation tell us?

A That eight pieces, so much weight and measurement, went on the MORGENSTER, three pieces, so much weight and measurement, went forward on the NEDERBURG.

Q With respect to the shipment in suit, did you receive a dock receipt for that shipment?

A Yes, I did.

Q Was it in the envelope of the partial shut-outs?

A Everything was in one envelope, all dock receipts.

Q Did the dock receipt relating to the shipment in suit indicate that anything had been shut out or that only part of a shipment had been shut out from the NEDERBURG?

A No, it did not.

Q Do you have the dock receipt?

A Yes.

Q It is the same dock receipt that you have before you?

A This is South African Marine's copy of the dock receipt.

THE MAGISTRATE: Wait a minute. You lost me.

You indicated earlier that when the cargo was received at the pier by ITO's checker you immediately received a dock receipt or a copy of the dock receipt from ITO.

You are now indicating that after the ship for which it was destined has gone out, if the cargo did not go forward on that vessel, or in part did not go forward, you received another dock receipt telling you of this. That would mean you would have received two copies of the dock receipt and not one.

Am I correct?

THE WITNESS: Yes.

THE MAGISTRATE: The one which is in front of you right now, Exhibit B, can you tell whether that was the one you got when the cargo was first received at the pier or whether that is the one you got indicating that the cargo had been shut out of the MORGENSTER?

THE WITNESS: When the cargo was first delivered at the pier.

THE MAGISTRATE: That is your first one.

Did you get a second one?

THE WITNESS: Yes.

THE MAGISTRATE: Do you have it?

THE WITNESS: No, I do not.

Q What does that indicate, that you don't have the dock receipt for the shipment in suit?

A I don't understand you.

Q You have shown us a sample of how a dock receipt is marked when part of a shipment is shut out.

A Right.

Q If the entire shipment which was to go on the MORGENSTER is shut out, how do you know that?

A We would just get a dock receipt similar to this one --

THE MAGISTRATE: He is indicating Exhibit E.

A In other words, ITO's copy of the dock receipt I would receive.

Q ITO's copy of the dock receipt?

A Yes.

Q The one that is before you here?

A Well, I don't know if this is ITO's copy.

Q No, the other one.

Where is it?

(Pause.)

Q I show you Defendant's Exhibit E.

(Handing.)

Is that ITO's copy?

A Yes.

Q Did that copy come to you?

A Yes, it did.

Q Subsequently, did you return that copy to

ITO?

A Yes, I did.

Q Now tell us, when that copy came to you, what did it indicate to you?

A This cargo was left behind and would be going on the next vessel, the NEDERBURG.

Q How much of the cargo was left behind?

A The 11 cartons and the one crate.

Q How do you know that the entire shipment was left behind?

A There is no notation on the dock receipt that part was loaded and part was on the pier.

Q If the 11 had been shut out from the MORGENSTER and the one crate alone had gone forward, would this dock receipt have had a notation similar to the one that you showed us as a sample?

A Yes, yes.

Q When you received the two piles of dock receipts, did you make any record or any list?

A Yes, I did.

Q I show you this document, and ask you if you can identify it.

(Handing.)

A Yes.

Q What is that?

A It is a list of MORGENSTER dock receipts by the port, discharge port at Durban, with the cargo that is to be loaded on the next vessel, the NEDERBURG.

Q Do you make a list like this in the regular course of your business to show what cargoes have been shut out from vessels?

A Yes, I do.

Q Was this list made in the regular course of business?

A Yes, it was.

Q And how much of the shipment in suit was shut out from the MORGENSTER?

A Twelve pieces, 4512 pounds, 381 feet.

Q The entire shipment?

A Yes.

MR. DE ORCHIS: I will offer this document in evidence.

MR. DALEY: Your Honor, I object to the introduction of this document into evidence since it is based on hearsay and based upon documents which are not in evidence.

MR. DE ORCHIS: It is his own handwriting.

THE MAGISTRATE: The hearsay part, in part, is what you have told him about what you didn't load.

In other words, he got a document from you, Exhibit E, which had no changes on it which indicated to him that none of that cargo had gone forward, so he made up his list based upon your E.

I grant you that this document's only source of exhibit is Exhibit E, and if Exhibit E is wrong, it is wrong, also. But it at least shows his state of mind and his belief as of the time he made it up.

For that limited purpose, it will be allowed in evidence.

MR. KOCHENDORFER: No objection on my part.

xxx (Copy of handwritten list received and marked Defendant's Exhibit G in evidence.)

THE MAGISTRATE: I take it you are offering Exhibit F, that the missing cargo is not listed on the partially shut out list?

MR. DE ORCHIS: Right. And to show an example of how a dock receipt would have been marked if a partial was shut out.

THE MAGISTRATE: I understand that.

MR. KOCHENDORFER: No objection on my part.

THE MAGISTRATE: While we are looking at

that, will you tell me, in your experience, if cargo arrives just before a vessel is filled and there is not too much space left for loading, which is more likely to get shut out, large crates or small cartons?

THE WITNESS: Large crates.

THE MAGISTRATE: And the fact that the cartons didn't go forward, then, would indicate even without any other documentation that the crate in all likelihood would not have gone, either?

THE WITNESS: No, according to our records I would have to say no.

Q Would not have gone?

A Would not have gone, that's right.

MR. DE ORCHIS: I would like to have Exhibit F received in evidence.

MR. DALEY: No, we don't have any objection to that.

xxx (Handwritten copy of list and copy of dock receipt received and marked Defendant's Exhibit F in evidence.)

THE MAGISTRATE: Let me ask you a question before I lose track of it.

I notice the one that was put in evidence as part of Exhibit F showing how they handle a partial forward and a partial shut out has a big stamp on it saying "next ship."

The dock receipt, Exhibit E, doesn't have such a stamp on it.

What does that indicate to you?

THE WITNESS: I believe there is no vessel name on the dock receipt. But there, again, this was done by ITO. I really can't say why.

THE MAGISTRATE: You don't know why they put "next ship" on Exhibit F but not on Exhibit E?

MR. DE ORCHIS: What he is saying is the next ship was there from the day that this arrived at the pier. Whatever the next ship is, that is where it is going on.

THE MAGISTRATE: You understand the "next ship" has nothing to do with the shut out aspect? It just indicates at the time of delivery they didn't care --

THE WITNESS: The dock receipt has no vessel name on it. I assume the pier put that vessel name on it.

THE MAGISTRATE: It has a vessel name on stamped over on top of a vessel. Over 3/15 is the word MORGENSTER in a stamp.

You do not, however, understand that this other stamp which says "next ship" to be something that is put on only after a shut-out?

THE WITNESS: No, I'm not familiar with that.

THE MAGISTRATE: Maybe some ITO witness will know more about that.

BY MR. DE ORCHIS:

Q When a shipper requests an on board bill of lading, how is the request transmitted to the carrier?

A In the form of the messenger which comes to the window with the bill of lading.

Q What does he say, "I want my bill of lading stamped on board"?

A Stamped on board.

Q When that request is made, who determines whether a bill of lading may be stamped on board or not?

A The traffic department.

Q And how do they determine that?

A Once the vessel has sailed and they have received word from ITO that all the cargo has gone forward or some has been left behind or whatever the case may be.

Q If you had knowledge that part of a shipment had been shut out of a particular bill of lading and they came to you with a bill of lading and you knew that one case had gone forward and you only have 11 left and the shipper wants an on board bill of lading stamped on such a bill of lading, would you stamp it?

A No, we would not.

Q It has to be a complete shipment before you would give an on board stamp?

A Yes.

Q How does the carrier know in the office in town that a shipment has been loaded on the vessel at the pier?

A Again, the traffic department calls the pier and they get authority from them or word from them that the vessel did sail and that all cargo has been loaded.

MR. DALEY: I am going to object to this whole line of questioning, your Honor. This man is not in the traffic department, he is in the documentation department.

If Mr. DeOrchis wishes to introduce evidence as to what the traffic department does, let him call somebody from the traffic department.

THE MAGISTRATE: You are a little late with your objection.

Incidentally, which entry on Exhibit G represents the cargo in question?

THE WITNESS: (Indicating.)

THE MAGISTRATE: All right. Dock receipt Number 207 giving the name Copeland, giving 12 pieces and the number 4512, which is what?

THE WITNESS: Gross weight.

THE MAGISTRATE: Then the measurement 381, which is entry Number 207 on Exhibit G.

Q Mr. Minutello, when you received ITO's copy of the dock receipt, what did you do with it?

A I made record of it on the list and then I returned it to ITO.

Q What was the purpose of making the record on the list?

A So we could track down South African Marine's copy of the dock receipt.

Q Of the cargo that was shut out?

A Right.

Q What was the next ship that sailed for South African Marine after the MORGENSTER sailed?

A The S.A. NEDERBURG.

Q Do you know whether this shipment which is shown on the dock receipts, including Defendant's Exhibit E, the dock receipt you returned to the pier, do you know whether that shipment got on the NEDERBURG?

A Yes.

Q How do you know?

A Well, the NEDERBURG left behind cargo and we, again, received a list from ITO personnel at the pier of the cargo that was left behind, and this dock receipt does not appear on the list.

Q I show you this document, and ask you if you can identify it.

(Handing.)

A This is the list.

Q That is the list of the cargo shut out --

A Of the cargo left behind on the NEDERBURG.

MR. DE ORCHIS: I will offer this document in evidence.

MR. MULROY: No objection.

MR. KOCHENDORFER: What is this?

THE MAGISTRATE: That is the cargo that was left behind by the NEDERBURG.

MR. KOCHENDORFER: Where did this come from?

MR. DE ORCHIS: He testified he received it from ITO.

THE MAGISTRATE: This is what he prepared after the NEDERBURG.

MR. KOCHENDORFER: I didn't hear him say he prepared it.

A No, I did not prepare it.

Q Where did this list come from?

A From the traffic department.

MR. KOCHENDORFER: I think I will have to object to that. It is just something sent in by the traffic department. I don't know what it really purports to be.

Q Does your company keep records of cargo shut out from vessels?

A Those would be considered the records.

Q What part of your company keeps such records?

A The traffic department.

Q Does the traffic department do that in the regular course of business?

A Yes, they do.

Q Do you know where this document came from, this piece of paper?

A That is my copy that the traffic department gave to me.

Q Did this come out of the company records?

A Yes.

Q Was this prepared in the regular course of business?

A Yes.

MR. DE ORCHIS: I offer it in evidence.

MR. KOCHENDORFER: May I ask where the top half of the page is?

MR. DE ORCHIS: Ask him.

Q He is asking you, do you know where the top half of the page is?

A I really do not know.

MR. KOCHENDORFER: Do you normally receive half pages from your other departments?

THE WITNESS: He may have some notes on the top half. I really do not know.

MR. PELTZ: The witness just testified before that he himself prepared similar documents.

THE MAGISTRATE: It is a matter of voir dire. Why don't you ask him.

VOIR DIRE EXAMINATION

BY MR. PELTZ:

Q Did you not prepare a document for the MORGENSTER as you did for the NEDERBURG?

A No, I did not.

THE MAGISTRATE: Why not?

THE WITNESS: Because it was handled by the traffic department.

THE MAGISTRATE: Why did you handle the MORGENSTER and they the NEDERBURG?

THE WITNESS: It was a question of who was less busy at the time.

Q Correct me if I am wrong. I thought you had testified that you normally prepare the type of document that you did for the MORGENSTER.

Are you now saying that because you were not as buy this was not prepared by you but was prepared by somebody else?

A Yes.

Q So you have no way of verifying whether the items on here are true or not? You have no idea, you did not see the dock receipts that this document is issued against?

A Oh, no, I did not.

Q Do you have any idea as to who personally wrote this out?

A Yes, I do.

Q The name of the individual?

A The traffic manager, Matty Percia.

Q But you have no idea whether he saw any of the documents that he --

A He would have to have seen the dock receipts, yes.

Q What date did you receive this document?

A I can't answer that. I don't know. It would have to be after, naturally, the NEDERBURG sailed.

MR. DALEY: Your Honor, I join in the objections to the document.

THE MAGISTRATE: It hasn't been clearly enunciated yet. I am waiting for it to come out.

Are you objecting, Mr. Kochendorfer?

MR. KOCHENDORFER: I am objecting, yes. I still don't know what it is. I don't think there is any foundation for it. It is a half a piece of paper off a half a photocopy from someone we don't know, and we don't know what information it is and when it was made in the ordinary course of business or when he received it or for what purpose it was prepared. It has no relationship.

Maybe it was prepared last week.

MR. DE ORCHIS: The witness has testified that this was prepared by the traffic department at the time because he was too busy to prepare it and it was prepared in the regular course of business.

If your Honor please, this is a small cargo case. If in a small cargo case we are required to bring every branch of the company to identify every piece of paper -- this very question came up before the Court of Appeals.

THE MAGISTRATE: Let me cut it short.

While you cannot identify precisely when this document was prepared and received by you, was it prepared at about or shortly after the time of the sailing of the NEDERBURG?

THE WITNESS: It would be after the sailing of the NEDERBURG.

THE MAGISTRATE: Within a week or so after the sailing of the NEDERBURG?

THE WITNESS: I would say our vessels normally sail Friday, I would say that list was prepared the Monday or Tuesday after sailing.

THE MAGISTRATE: And it was prepared by your traffic department in the normal course of their employment as a collateral duty that they do in your place on some occasions?

THE WITNESS: Yes, sir.

THE MAGISTRATE: And you have had in your possession since then this copy of that document?

THE WITNESS: Yes, I have.

THE MAGISTRATE: All right. The document may be received in evidence.

Obviously the weight to be given to the document, however, is affected by the fact that the witness did not check the dock receipts and can give no personal weight to the correctness of the statement. But I think as a record kept in the regular course of business it is admissible.

xxx (Copy of handwritten list received and marked Defendant's Exhibit H in evidence.)

DIRECT EXAMINATION CONT'D

BY MR. DE ORCHIS:

Q Mr. Minutello, after the NEDERBURG sailed, did ITO send to you a dock receipt showing that any part of the shipment was shut out from the NEDERBURG?

A I did not handle the NEDERBURG shut-outs. Everything went to our traffic department.

MR. DE ORCHIS: May I ask ITO, do they have a dock receipt showing a partial shut-out, like you did in the other case that is in evidence?

MR. DALEY: In the other case, the only dock receipt that we produced was the one that said the MORGENSTER.

MR. DE ORCHIS: What I am asking for is a dock receipt that would show, in the handwriting of ITO people, a partial shut-out like this (indicating).

MR. DALEY: We don't have any document like that. At least not to my knowledge. I am not going to bind ITO to my knowledge.

Q Mr. Minutello, was a manifest prepared in connection with the NEDERBURG voyage from New York?

A Yes, there was.

Q Is the manifest required by law to be prepared?

A Not by law. I don't believe so.

We have to file with Customs four working days after the vessel sails either a copy of the manifest with the export deck or a bill of lading.

Q I show you this document and ask you if you can identify it.

(Handing.)

A Yes. This is a copy of our manifest.

Q Is the shipment in suit shown on the manifest of the NEDERBURG?

A Yes, it is.

Q Is the complete shipment shown on the manifest of the NEDERBURG, 12 cases?

A Yes, it is.

MR. DE ORCHIS: I will offer the manifest in evidence.

MR. DALEY: Your Honor, I would like to have a voir dire on this, please.

THE MAGISTRATE: Surely.

Before you start the voir dire, let us mark it for identification as Exhibit I.

xxx (Copy of manifest marked Defendant's Exhibit I for identification.)

VOIR DIRE EXAMINATION

BY MR. DALEY:

Q Sir, did you testify that you make up this manifest?

A South African Marine Corporation makes it up, I do not.

Q Who in the employ of South African Marine makes it up?

A We have a computer service bureau that makes up the manifest.

Q Do you operate the computer?

A No, I do not.

Q Do you supply merely a feed into the computer?

A Yes.

Q What part?

A A coded copy of the bill of lading.

Q And this manifest is based on a bill of lading?

A That is correct.

Q And isn't it true that the bill of lading is issued by South African Marine?

A Yes, it is.

Q Do you ever check hatch tallies or dock receipts before you make out this manifest?

A No, I do not.

Q Wouldn't it be a good idea before you make up a manifest for Customs or whatever to find out exactly what is on a ship?

A We assume that once we have the dock receipt --

Q I am not asking for your assumption, sir. I am asking, wouldn't it be the best idea to find out what is exactly on a ship?

MR. DE ORCHIS: I would suggest this is

cross-examination, not voir dire.

THE MAGISTRATE: It is.

Q All your entries here are based upon documentation?

A That is correct.

Q Have you ever had cargo that was manifested, that was actually on a manifest and was never shipped?

A Yes.

Q Have you ever had cargo that was not manifested that was delivered at a port of discharge that was not supposed to be on a ship?

A Yes.

MR. DALEY: Your Honor, I object to this going into evidence.

THE MAGISTRATE: If your objection is that it doesn't add any weight to the bill of lading, this merely repeats the bill of lading information and, consequently, is not an independent source for any proof of the fact that it was on board, that is a point.

However, I think they are entitled to show that all their record keeping is consistent, even though it may all be wrong.

MR. DALEY: Your Honor, my point is --

let me ask the witness a couple more questions.

Q Sir, on the top of this form it says "General Manifest of Cargo Laden on Board," and then the line below that it says the M.V. NEDERBURG; is that correct?

A Yes.

Q Has it been your experience that sometimes the manifest does not list all the cargo that is on board?

MR. DE ORCHIS: Objection, your Honor.

THE MAGISTRATE: I will allow it.

A I'm really not familiar with it.

Q You have never heard of an instance where there was cargo that was not manifested that was actually on board ship?

A Oh, yes, I have heard of instances.

Q And you have actually heard of instances where cargo was left on the pier and manifested?

A Yes.

MR. DE ORCHIS: Left on the pier by ITO, I take it.

MR. DALEY: I don't know what stevedore you are talking about. What port are you talking about?

THE MAGISTRATE: Gentlemen, let us move on.

Q Sir, is it a true statement that this vessel sailed on March 22, 1974? That is what your manifest says. Is that a true statement?

A That is the last working day that the vessel was in the port, yes.

Q Is that the -- it says sailed 3/22/74.

Is that the date the NEDERBURG sailed?

A No, it is not.

Q So that is really not a true statement, is it?

A At the time the manifest was prepared it may have been advertised for the 22nd and it may have been held over. I believe the vessel sailed on the 24th.

Q So in other words, you follow your advertisements to find out when your vessels sail; is that correct?

A For manifesting purposes, yes.

MR. DALEY: I object, your Honor.

THE MAGISTRATE: Again, it goes to the weight to be given to the document and I will overrule the objection and allow it to be admitted in evidence as Exhibit I.

MR. KOCHENDORFER: Can we offer an objection to it?

THE MAGISTRATE: I thought you had already done it.

MR. KOCHENDORFER: I haven't even seen it yet.

THE MAGISTRATE: All right. Show it to counsel.

(Pause.)

THE MAGISTRATE: Mr. Daley, in line to your objection to that, it becomes increasingly clear that all the documentation is done on a negative rather than affirmative basis, which is to say, they assume it goes forward unless they are told to the contrary, and all they are told about are shut-outs and hold-backs, and they prepare affirmative documents based on the absence of negative information.

Indeed, even starting with the dock receipt, it is prepared in advance of the receipt of the cargo and it is presumed to be correct unless somebody puts a negative in or an objection to it.

Everything which happens thereafter is done on the assumed basis that the existing documentation is correct, unless an exception is noted on it, and everything which goes forward is created on that basis.

The manifest rests upon the bill of lading; the bill of lading rested upon the nonreceipt of a returned dock receipt from ITO after the NEDERBURG left, from which South African assumes that it went on the NEDERBURG. They make this assumption because they know it came on the pier from the dock receipt, to which you took no exception; they believe it did not go on the MORGENSTER because they say you returned the doc[illegible]eceipt to them in an envelope of shut out carg[illegible].

Everything here is done on a negative rather than an affirmative basis.

MR. KOCHENDORFER: I want to object to the offering of this into evidence based on the testimony of the witness that this was prepared before he had the information in his hand from which he could prepare it. It was prepared strictly on speculation.

MR. DE ORCHIS: We are dealing with the manifest --

MR. KOCHENDORFER: He testified that the information came in six days later after that was prepared, so that could not accurately reflect the information which they had.

THE MAGISTRATE: Was this manifest prepared before you received the returned dock receipts which advised you of shut out cargo?

THE WITNESS: No, it is not.

THE MAGISTRATE: When is it prepared?

THE WITNESS: The manifest is prepared approximately one week after the vessel sails.

It is our policy -- as I said before, the vessel sails on Friday, the manifest is prepared the Thursday night following the sailing. We get the list of the shut-outs, if any, from ITO on that Monday.

THE MAGISTRATE: And this list of shut-outs from the NEDERBURG, which is Exhibit H, was in your possession before Exhibit I, the manifest, was prepared?

THE WITNESS: That's correct.

MR. KOCHENDORFER: He testified that he didn't know when it came into his possession, so how can he say it came into his possession before the manifest was prepared? He hasn't stated the date the manifest was prepared, he hasn't stated the date he received that half a piece of paper.

THE MAGISTRATE: Could you have prepared the manifest until you had received Exhibit H?

THE WITNESS: No, we could not.

THE MAGISTRATE: On that basis, I will allow the document in evidence.

xxx (Defendant's Exhibit I for identification received in evidence.)

DIRECT EXAMINATION CONT'D

BY MR. DE ORCHIS:

Q Mr. Minutello, the bill of lading contains an on board -- you have it before you, Plaintiff's Exhibit Number 1.

Plaintiff's Exhibit Number 1 has a clause on it which states "Received on board March 22, 1974, South African Marine."

Do you see that in the upper left-hand side, the on board stamp?

A I see it on the right-hand side.

Q I am sorry, the right-hand side, the on board stamp.

A Yes, I do.

Q Does that indicate that that shipment was loaded on board on March 22nd?

A No, it does not.

Q Would you tell us why this was stamped March 22nd?

A It is the custom of the port and the custom of South African Marine to date on board the last working day that the vessel is in port loading. By working day I mean Monday to Friday.

Q And this vessel, was it supposed to finish on Friday?

A Yes, it was.

Q And when did it actually finish working?

A I believe Sunday, the 24th.

Q When a bill of lading is stamped on board, when is it released to the shipper?

A After the vessel has sailed and we have confirmation that the cargo is, in fact, on board.

Q Is that a practice of South African Marine or is that a partice of the Port of New York?

A I would assume it is the practice of the Port of New York.

Q How many years have you been in the business?

A Eighteen years.

Q And has that been true in the 18 years you have been in the business that on board bills of lading are released to the shipper only after the vessel has sailed?

A That is correct.

THE MAGISTRATE: Did the NEDERBURG come into port before the MORGENSTER left?

Can you tell from those documents?

THE WITNESS: No.

THE MAGISTRATE: You can't tell?

THE WITNESS: I would say no.

They are usually scheduled a week apart. I don't have the date.

THE MAGISTRATE: The MORGENSTER sailed on the 16th and your on board stamp for the NEDERBURG is dated the 22nd. Normally, she would be in port what, three or four days?

THE WITNESS: Three days, usually Wednesday, Thursday, Friday.

Q Just one or two more questions, Mr. Minutello.

If one crate had been shut out from the NEDERBURG and only 11 would have gone forward, assuming that happened, what notice would you have had? How would you have notice of that?

A From an ITO dock receipt.

Q They would return the dock receipt with the partial shut-out note?

A When you are saying the NEDERBURG, that would be this list (indicating). Some notation would be on this list.

Q And was there any notice given to South African that one crate was shut out from the NEDERBURG?

A No, there was not.

Q To the best of --

A To my knowledge.

Q To the best of your knowledge and based on all the company records that you have been able to find, did this entire shipment go forward on the NEDERBURG?

MR. KOCHENDORFER: I will object to the question.

THE MAGISTRATE: On what grounds?

MR. KOCHENDORFER: We have already put all of these documents on and he said they have all sorts of discrepancies on them. Now he is asking him to draw a conclusion from it to the best of his knowledge. He has no knowledge as to whether it went on board.

MR. DE ORCHIS: I was trying to help your case.

Q Do you have any record other than what we have seen here today, do you know of any other company record which indicates that one crate was shut out from the NEDERBURG?

A No, I do not.

MR. DE ORCHIS: I have no further questions.

THE MAGISTRATE: Cross-examination.

CROSS-EXAMINATION

BY MR. KOCHENDORFER:

Q Do you have any personal knowledge in this case of the cargo that went on board the NEDERBURG?

A I don't understand what you mean by personal knowledge.

Q Did you see it go on board?

A No, I did not.

Q Are all the documents out of your department based solely on information presented to you or not presented to you?

A Presented to us from ITO, yes.

Q And if you don't receive the document, you assume everything went in order?

A That's correct.

Q So if a case was left on the pier and it was not technically shut out, you wouldn't know about it?

A Well, the dock receipt would have been cut from 12 to 11 pieces.

Q I said, if the case was left on the pier and not technically shut out, it was just not noticed there, you wouldn't be informed of that, would you?

A No, I would not.

Q So that if it did not go onto the ship because it was left inadvertently on the pier, you would still cut a bill of lading saying it was on board?

A Yes, I would.

MR. KOCHENDORFER: That's all I have.

THE MAGISTRATE: Cross-examination by the third party defendant.

CROSS-EXAMINATION

BY MR. DALEY:

Q May I see the documents?

A All of them?

Q Yes.

A Yes.

(Handing.)

Q Sir, I am a little confused and I am going to ask you some questions so that maybe you can straighten some things out in my own mind.

A Okay.

Q A trucker comes to a pier and receives a copy of the dock receipt; is that correct?

A I assume so. I'm not familiar with that.

Q A copy is kept by ITO, right?

A Yes.

Q And a copy is forwarded to South A,rican Marine; is that correct?

A That's correct.

Q Which one of these exhibits was forwarded to you by ITO?

(Handing.)

A This would be the one (indicating).

Q That is the one?

A Yes.

Q In the exact form as it was forwarded to you?

A No, not in the exact form, no.

Q What would be the differences between the one that ITO forwarded to you and that exhibit?

A The vessel name, the writing in blue ink and the bill of lading number in black crayon, together with a phone number.

Q What?

A A bill of lading number and this phone number.

Q And you testified that the name of the vessel was changed?

A Yes.

Q A determination was made by somebody at South African Marine to shut this cargo out of the MORGENSTER and put it on the NEDERBURG.

A That I don't know.

Q It went on the NEDERBURG?

A Yes.

Q And it was originally booked for MORGENSTER?

A Yes.

Q I thought you were in the documentation department.

A That is a completely different department.

Q So you don't know what cargo this ship was booked for?

A No, I do not.

Q Do you know the date when any of those changes were made?

A The exact date, no.

Q Was it after the MORGENSTER sailed?

A Oh, yes, it would be after.

Q After the MORGENSTER sailed. Okay. You said you made up bills of lading.

A That's correct.

Q What do you use to make up the bills of lading?

A The dock receipt.

Q Which dock receipt?

A This dock receipt.

Q The one that you receive from ITO?

A Right.

Q Do you know what pile of dock receipts you received this in, what vessel?

In other words, you receive a pile of dock receipts, doesn't it go according to vessel?

A Yes, it does.

Q Are those dock receipts broken down by vessel?

A Yes, they are. Broken down by vessel and by discharge port.

Q By vessel and by discharge port?

A Right.

Q Do you remember as of March 1974 how these documents came to you?

A I can assume they came as --

Q I am not asking you for your assumption. I am asking you, do you know?

You received these documents, didn't you?

A Not personally, no.

Q You didn't personally receive them?

A No, I didn't.

Q Who did?

A It would have been one of my men in the department.

Q When is the first time you saw this document?

A It's very hard to say. I really don't know.

Q Did you just see it a week ago, a year ago?

A No. I would have had to have seen it beforehand. I would definitely have seen it when the shut out dock receipts came up.

Q The shut out dock receipts came up?

A The cargo left behind.

Q I believe you testified if there is cargo shut out, there is another dock receipt forwarded to you.

A Yes, ITO's copy.

Q Which would be that one? That would be Defendant's Exhibit E?

A Okay.

Q Defendant's Exhibit E, that would be the one that ITO would send to you to show a cargo was shut out?

A Yes.

Q And would they mark on there that it was shut out?

A No, it would not.

Q What would they send?

A It was in a brown envelope with the notation "MORGENSTER Dock Receipts, Cargo Shut Out."

Q Do you know if, in fact, that happened in this case?

A Yes.

Q How do you know that?

A Because I have it on my list.

Q You have it on your list, which is --

A That one there, I believe. Dock receipt 207.

Q And you are sure that this was in the pile of shut out cargo for the MORGENSTER: is that correct?

A Yes.

Q Did you do any further checking?

A No, I did not.

Q Did you ask for hatch tallies?

A No, I did not.

Q Why not?

A We assumed this was correct, the information given us by ITO, that it was left behind on one vessel, it would not be left behind on a second one.

Q Why didn't you ask for hatch tallies, though? Wouldn't hatch tallies tell you exactly what was loaded on the dock receipt?

A That I don't know. I've never seen one.

Q You have never seen a hatch tally?

A No, sir.

Q Before you issue bills of lading, do you ever ask for hatch tallies?

A No, we do not.

Q And you go and stamp on board March 22, 1974 and you have never seen a hatch tally?

A No, I did not.

Q All you rely on is dock receipts?

A That's right.

MR. DE ORCHIS: No. He testified he relied on ITO.

MR. DALEY: Are you testifying, Mr. DeOrchis?

MR. DE ORCHIS: No, I am saying.

Q Even if the shut out thing is wrong, okay, just assuming that it is, and supposing one case was loaded aboard the MORGENSTER, wouldn't it still be in the custody of South African Marine?

A That I don't know.

Q You don't know who owns the MORGENSTER?

A You are saying that it was left on board the pier.

Q Supposing it was loaded on board the MORGENSTER, one crate, and the other 11 went on the NEDERBURG, wouldn't it still be in the possession of South African Marine?

A If this is true, I would assume so.

Q And isn't the MORGENSTER owned or operated by South African Marine?

A Yes, it is.

Q So if the cargo is loaded aboard a vessel, shouldn't it eventually get to somewhere?

A Yes.

Q It just doesn't disappear, does it?

A No.

Q Do you have a listing like this for the MORGENSTER?

A That would be this list.

Q That is the same as that list, right?

A Yes.

Q It appears there was a lot of cargo that was shut out of the MORGENSTER that was not shut out of the NEDERBURG.

A That is correct.

THE MAGISTRATE: Is that really what you mean, Mr. Daley, or are you saying to him there was more cargo shut out from the MORGENSTER than there was from the NEDERBURG?

MR. DALEY: That's correct, your Honor.

THE MAGISTRATE: Because it would be most unusual to have cargo shut out from one vessel and not make the next vessel. If they are going to shut something out from the next vessel, it would, I would think, be the most recently received cargo.

Am I correct?

THE WITNESS: Yes, that's correct.

Q Sir, that shut out list that you have there that you prepared you said, that was for all cargo booked on the MORGENSTER?

A I don't know about cargo booked.

Q How do you find out what vessel it is supposed to go on?

A I said the dock receipt came up from ITO in an envelope.

Q And you made up a list?

A That's right.

Q A shut out list?

A Yes.

Q And you said it was from the MORGENSTER pile of documents from the shut out documents?

A Yes.

Q Isn't this cargo shut out from the MORGENSTER?

A Yes.

THE MAGISTRATE: You didn't ask him that. You asked for cargo booked.

He is making that distinction.

This list concerns cargo that was shut out from the MORGENSTER. It may not have been booked for the MORGENSTER, it may have been booked for next vessel or any vessel.

MR. DALEY: Your Honor, if a dock receipt was prepared, the man, Mr. Catania testified this morning that he first books the cargo before he makes up the documentation, so if the original dock receipt did say MORGENSTER, it was booked for the MORGENSTER.

THE MAGISTRATE: Mr. Catania does, but that doesn't mean that everybody that is sending them cargo necessarily books a particular vessel.

The one document in evidence wasn't originally listed for a vessel, it says "next ship with a big stamp.

I think that was the distinction he was making.

But the document in front of you, there is no question in your mind lists all the cargo that had a label on it to be put on the MORGENSTER when it was on the pier, but didn't make the MORGENSTER?

THE WITNESS: That's correct.

Q Just tell me, is this list just based upon dock receipts?

A Yes, it is.

Q Did you request that ITO make a pier tally to find out what cargo was shut out?

A I did not, no.

Q Did anybody in the employ of South African Marine?

A I don't know.

Q Wouldn't that be the best way to do it to find out what was shut out of the MORGENSTER?

A Again, I really don't know.

Q Haven't you already testified that there are times that cargo is loaded on board a ship that isn't manifested, there is no bill of lading for it? Haven't you already testified to that?

A Yes, I have.

Q Wouldn't it be the best way to check and find out what was left on the pier to actually have someone go down on the pier and say "There are 11 cartons, there are ten cartons"? Wouldn't that be the best way to find out?

A I believe ITO did that. I don't understand how I could get this dock receipt from ITO if they did not physically go on the pier and say that the cargo was still left on board.

Q What vessel does that say it is for?

A The MORGENSTER.

Q But isn't there a method by which South African Marine can say, "I want a pier tally for everything that is left on the pier"?

A I don't know.

Q You have never heard of that?

A No.

Q Sir, on this document that has been marked as Defendant's Exhibit F, you prepared that first page of that document; is that correct?

A That's correct.

Q And where did you get the information to fill that document in?

A From the dock receipt supplied by ITO in the envelope.

Q The dock receipt in the envelope?

A Right.

Q What about the second document?

A This is our copy of the dock receipt.

Q That is your copy of the dock receipt?

A South African Marine's copy, yes.

Q And you stamped it "next ship"?

A No, we did not.

Q Who stamps it "next ship"?

A I assume ITO I

Q I am not asking for assumption. I am asking you, who stamps it?

A It is not done by South African Marine.

Q You don't know who did it?

A No.

Q Do you know who specifically sends you those dock receipts? Do you know who specifically does it?

A I believe his name is John Flynn, receiving clerk at the pier.

Q Sir, do you know if there was ever a check made for the Voyage 28 of the NEDERBURG as to cargo that was not manifested but was carried by the NEDERBURG?

A I don't know.

Q You don't know?

A No.

Q You have never seen such a document?

A No, not to my knowledge.

MR. DALEY: That's all.

MR. DE ORCHIS: I have no further questions.

THE MAGISTRATE: You are excused.

(Witness excused.)

THE MAGISTRATE: We will take a five-minute recess.

(Recess.)

THE MAGISTRATE: All right.

Call your next witness.

MR. DE ORCHIS: I am not going to call any more witnesses.

THE MAGISTRATE: You have no more witnesses?

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You are resting?

MR. DE ORCHIS: I am resting, right.

MR. KOCHENDORFER: Your Honor, can we at this time move for a verdict in our favor?

THE MAGISTRATE: You can move.

I will reserve decision on your motion.

In any event, we obviously would have to try the claim over against the third party defendant.

All right. The third party defendant may call its first witness.

MR. DALEY: Mr. Beauchamp.

Excuse me for a second.

Your Honor, Mr. Kochendorfer has started out by reading several interrogatories and answers to interrogatories. I plan on doing the same just as an introduction.

The plaintiff Elgie & Company served interrogatories upon the defendant South African Marine Corporation, Ltd. which were answered by the attorneys for South African Marine on or about the 8th day of October, 1975.

In relation to plaintiff's question Number 1, the question was, "Please examine the annexed document marked Exhibit A."

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That was a bill of lading, your Honor, which has already been introduced in evidence at this trial.

"(a) Is it not a copy of the bill of lading covering the shipment described in the Complaint? If not, how does it differ?

"(b) Was not the original issued by or on behalf of the master of the S.S. S.A. NEDERBURG?

"(c) Was not the original issued by or on behalf of defendant South African Marine, Ltd.?"

In relation to plaintiff's questions 1(a), (b) and (c), South African Marine answered "Yes."

The second plaintiff's question was, "Describe in detail the relationship of the defendant to the S.S. S.A. NEDERBURG."

"South African Marine Corporation, Ltd. are the owners of the S.A. NEDERBURG."

Next question, plaintiff's question Number 7: "Was the subject shipment ladened aboard the S.A. NEDERBURG? If so, state when the subject shipment was ladened aboard the S.S. S.A. NEDERBURG."

Answer: "The crate was loaded aboard the S.A. NEDERBURG because same was not found on dock. We do not know the exact date, but the vessel loaded

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New York on March 21, 1974 and sailed March 24, 1974."

In relation to plaintiff's question Number 9(a), "Were any loading tallies prepared by the defendant, its agents or employees? If so, state by whom such tallies were made, giving the name, address and job time."

Answer to (a), "A checker for the stevedores, International Terminal Operating Company, tallied the cargo aboard the S.A. NEDERBURG. Defendant does not know his name and address."

THE MAGISTRATE: That is the checker for ITO?

MR. DALEY: Yes.

In relation to plaintiff's question Number 15, "State if delivery receipts were executed, and if so, by whom and in whose possession are these delivery receipts."

Answer: "Defendant does not know if delivery receipts were executed."

In relation to plaintiff's question Number 16, "Describe each such delivery receipt and notations thereon or attach a true and complete copy of each to your answers."

Answer of the defendant South African

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Marine, "See answer to Number 15 above, which states 'Defendant does not know if delivery receipts were executed.'"

On October 17, 1975, the attorneys for the defendant South African Marine, Ltd. served interrogatories on the attorneys for the plaintiff Elgie & Company which are answered by the attorneys for the plaintiff on October 24, 1975.

In relation to defendant South African Marine Corporation Question 13, the question was, "State whether the shipper was to pack the shipment, and if not who, in fact, did pack the shipment."

Answer: "Unknown to plaintiff."

Question Number 19, "State whether an agent or an officer of plaintiff or its assured inspected the cargo in suit either before loading onto the vessel or after discharge from the vessel and whether any reports or surveys were made at that time. If so, please set forth the name and address of such officer or agent, the date of the report and the name and address of the present custodian of such report."

The answer to that question was "No."

In relation to defendant's question

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Number 20(a), "State whether the shipment referred to in the Complaint remained from the time the items were packed until the time they were placed on board the vessel, setting forth the date and length of time the shipment remained in each place and the name and address of each custodian."

Answer: "Unknown to plaintiff."

In relation to defendant's question Number 21, "State whether any exceptions to the condition of the shipment in suit was noted between the point of origin and the delivery aboard the vessel. If so, give the particulars thereof."

Answer: "Unknown to plaintiff."

In relation to defendant's question Number 28, "State whether it is claimed that the shipper gave defendant any special directions or instructions with respect to the stowage or handling of the shipment in suit. If so, set forth the content of the special instructions, special directions or instructions and how plaintiff claims defendant failed to comply if it is so claimed."

Answer: "Unknown to plaintiff."

In relation to defendant's question Number 35, "State whether or not the plaintiff, or

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anyone on its behalf, requested from this defendant the charterer or anyone else an extension of suit time. If the answer is in the affirmative, set forth the terms of any extension or attach a true copy thereof."

"No."

I am really putting that in for myself, your Honor, as the attorneys for ITO, that ITO did not grant any extensions of time, of suit time based upon the attempt by the attorneys for the defendant to try to plead over in favor of the plaintiff against the third party defendant ITO.

THE MAGISTRATE: The plaintiff hasn't attempted to do it itself.

MR. DALEY: Okay.

On December 5th, 1975, the attorneys for International Terminal Operating Company served a request for admissions upon both the defendant South African Marine Corporation, Ltd. and the plaintiff Elgie & Company, which were answered as follows:

That Exhibit B, which is the bill of lading which has been marked as Plaintiff's Exhibit Number 1, was issued by the employees of the defendant South African Marine.

The answer, and these are the answers by the plaintiff Elgie & Company and I will then do the answers by South African Marine, the answer, plaintiff admits that the bill of lading attached as Exhibit B was issued by the S.S. S.A. NEDERBURG and the defendant South African Marine Corporation, Ltd.

THE MAGISTRATE: Incidentally, the one-year limitations period would derive from COGSA and the bill of lading, would it not?

MR. DALEY: That is correct.

THE MAGISTRATE: As does the package limitation.

MR. DALEY: That is correct, your Honor.

THE MAGISTRATE: How can you have a situation where one applied and the other didn't?

MR. DALEY: Because if, in fact, it didn't apply -- we have a Himalayan clause in the long form bill of lading.

THE MAGISTRATE: It happens I am not familiar with the Himalayan clause.

MR. DALEY: It does give us the benefits of the carriage of goods by sea acts as to certain sections.

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MR. KOCHENDORFER: If the bill of lading is valid.

MR. DALEY: If the bill of lading is not valid and the only contract I have is a stevedoring contract with South African Marine --

THE MAGISTRATE: My point to you is if the bill of lading and COGSA applies, the plaintiff is limited to $500 and all of this has been a voyage into futility.

MR. DALEY: That's correct.

THE MAGISTRATE: If it doesn't apply and he is not so limited, it would seem to me the one-year period of limitations doesn't apply, either.

MR. KOCHENDORFER: That's correct.

MR. DALEY: I was never sued directly by the plaintiff.

THE MAGISTRATE: I know. But you are raising the circumstances as an extension of the period of limitations, and it seems to me that if it is in the case, so is the 500 package limitation, and if the 500 package limitation isn't in the case, nor is the one-year limitation period.

MR. DALEY: Yes, your Honor. But to set the record straight, the plaintiff has only sued

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South African Marine.

THE MAGISTRATE: I know that.

MR. DALEY: They have not sued me.

THE MAGISTRATE: I know that.

MR. DALEY: And the attorneys for the defendant have just sought indemnification from me.

THE MAGISTRATE: I am aware of that.

MR. DALEY: Therefore, since I did not issue a bill of lading, I am not bound by the bill of lading, I am only bound by my contract with South African Marine.

THE MAGISTRATE: What does the one-year limitation have to do with you?

MR. DALEY: I put that in before because I prepared a little summary in case they did try to amend and I just forgot to cross that specific question out.

THE MAGISTRATE: All right. Why didn't you say so in the first place?

MR. DALEY: In relation -- these are Elgie & Company's answers again.

In relation to third party defendant request for admission Number 11, that Exhibit B, which is, again, Plaintiff's Exhibit Number 1,

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states that the package described therein was received on board on March 22, 1974.

Answer: "Admitted."

In relation to third party defendant's request for admission Number 12, that, in fact, only 11 of the packages described in Exhibit B were loaded aboard the S.A. NEDERBURG on the voyage in question.

Answer: "Plaintiff can neither admit or deny what was loaded aboard the S.A. NEDERBURG as plaintiff was not present at the loading."

Plaintiff has alleged that only 11 of the packages described in Exhibit B, which is Plaintiff's Exhibit Number 1, were loaded on the S.S. S.A. NEDERBURG from information obtained from other documents and investigation.

In relation to the third party defendant's request for admission Number 13 --

THE MAGISTRATE: How many more do you have?

MR. DALEY: Not that many more, your Honor.

THE MAGISTRATE: How many is not that many more?

MR. DALEY: About ten.

THE MAGISTRATE: That is too many more.

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I think I'd rather read them at my leisure than listen to them now.

MR. DALEY: Fine. I will just list the specific ones.

THE MAGISTRATE: Please.

MR. DALEY: Third party defendant's request for admission Number 13. This is in relation to the plaintiff now, your Honor.

THE MAGISTRATE: Yes.

MR. DALEY: Third party defendant's request for admission Number 18.

THE MAGISTRATE: You can just give me the number.

MR. DALEY: These are the requests for admissions as answered by defendant South African Marine.

Request for admission Number 5, request for admission Number 6, request for admission Number 8, request for admission Number 11, request for admission Number 12.

Your Honor, the ITO exhibit, the dock receipt, which is Exhibit E -- Exhibit A, which is actually defendant South African Marine Exhibit E -- identifies the dock receipt number as 207 for

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the shipment in question. That is admitted.

The copy of the dock receipt is the same as Defendant's Exhibit E.

THE MAGISTRATE: Of which we have three copies already in evidence.

MR. DALEY: The request for admissions was only in relation to Defendant's Exhibit E.

THE MAGISTRATE: All right.

MR. DALEY: The next one is Number 18, your Honor.

THE MAGISTRATE: Will you call a witness now?

MR. DALEY: I would now like to call Mr. Beauchamp.

LEONARD FRAWLEY BEAUCHAMP,

called as a witness by the third party defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DALEY:

Q Mr. Beauchamp, where are you presently employed?

A The Brooklyn Army Base for ITO.

Q How long have you been employed by ITO?

A Going on 12 years.

Q And what is your present position with ITO?

A Superintendent.

Q Is that a pier superintendent?

A Yes.

Q What are the duties of a pier superintendent?

A A pier superintendent is in charge of the operation, loading and discharging of vessels and the terminal operation, overall charge.

Q Were you employed by ITO in March of 1974?

A Yes, sir.

Q And what was your position in March of 1974?

A Pier superintendent.

Q Were your duties in March of 1974 the same as they are today?

A Yes, sir.

Q Were you also employed at the Brooklyn Army Terminal in March of 1974?

A Yes, sir.

Q Could you give me the names of any steamship companies that used that terminal in March of 1974?

A Frankly, I don't really recall. I don't know whether the Orient Line was operating then with us or not, plus the South African Marine. South

African Marine I was more concerned with.

Q South African Marine did use those piers?

A Yes, sir. Yes, sir.

Q And how many piers are there?

A There are three piers.

Q And did South African Marine use all three?

A Primarily Pier 2.

Q In March of 1974, what vessels belonging to South African Marine or operated by South African Marine docked at these piers?

A The EGTON, the MORGENSTER and the NEDERBURG.

Q Was ITO the stevedore employed by South African Marine at these piers?

A Yes, sir.

MR. DALEY: Your Honor, before I go any further, I spoke to Mr. DeOrchis and I requested that he stipulate that this is the ITO contract with South African Marine that was in effect in March of 1974.

I now show it to Mr. DeOrchis and ask him if he will stipulate to it.

MR. DE ORCHIS: Is this the same one that the witness identified on the deposition?

MR. DALEY: The witness testified at

deposition that he knew there was a contract. I produced that contract from my files that was forwarded to me by ITO, but the witness himself had never seen the contract.

(Pause.)

MR. DALEY: I would like to have this marked, your Honor, as Third Party Defendant's Exhibit G and mark it into evidence.

THE MAGISTRATE: Any objection?

MR. DE ORCHIS: No objection.

MR. KOCHENDORFER: No.

xxx (Copy of contract dated January 1, 1963 between ITO and South African Marine Corporation, Ltd. received and marked Third Party Defendant's Exhibit G in evidence.)

MR. DALEY: It has been stipulated; is that correct, that this was the contract in effect in March of 1974?

MR. DE ORCHIS: Yes.

BY MR. DALEY:

Q Sir, would you please generally describe the pier or terminal area at the Brooklyn Army Base terminal.

A Pier 1 is an open pier where we store

containers and heavy lifts.

Pier 2 is a closed pier.

Pier 3 is a closed pier. General cargo is stowed inside of those two piers.

Normally Pier 2 South African Marine uses, sir. And for containers and heavy lifts, Pier 1.

Q Can you tell me the general arrangement inside the shed, like how cargo is broken down? Is it done by port, by vessel or how is it done?

A It is broken down by port and by vessel.

Q Are you familiar with the general procedures followed by ITO from the time a consignment is delivered at the receiving clerk until it is loaded aboard the vessel?

A Yes, sir.

Q Could you please just generally describe for us the documents and everything else that come into effect.

A Well, do you want the full thing, like the truck entering at the gate where a record is kept?

Q Yes.

A A truck driver comes in and he is entered on a gate pass. He receives a gate pass at the opening of the pier. Pier 2 we are talking about.

From there he goes over to the receiving office, takes his papers inside, his dock receipts and has them stamped and okayed by a temporary clerk or receiving clerk.

After that the documentation is put in order. The time is shown on the gate pass.

He then leaves there and goes over to the dock boss. The dock boss, in turn, has an assistant who gives out the papers to a checker available.

Then he backs his truck in and he moves the cargo to the tailgate and we remove it from there. He puts it normally on a pallet, or sometimes it has to be dragged off, it depends.

Q He might put it on a pallet?

A Yes, sir.

Q Now it is in place in the shed?

A Right.

Q And how do you determine where it is going to be placed in the shed?

A Normally the location is given out before for that particular port. It would say Bay 88 to 86 or 88, whatever it is. This is done by the dock boss.

Q Would it also be by vessel?

A Yes, sir.

Q Has the dock receipt been signed by the receiving clerk up to this time?

A No, no.

After the checker tallies off the truck, what we receive, he then signs the back of the dock receipt. The driver then takes the dock receipt in and it is stamped again and signed by a receiving clerk.

Q And does the trucker get a copy of this dock receipt?

A He gets a copy of the signed receipt, yes.

Q Who else gets a copy of the signed receipt?

A South African Marine.

Q Does anybody else get a copy of the receipt?

A No, sir. Normally, no.

Q Normally, no?

A No.

Q So there is only three copies of the dock receipt?

A There are four copies. Four copies of the receipt. One is kept -- given to South African Marine, one is given to the truck driver, one is kept for our file and one is given to the plan clerk.

THE MAGISTRATE: To what?

THE WITNESS: To a plan clerk, sir.

Q Were these general procedures followed by ITO on the shipment in question?

A Yes, sir.

Sometimes you might have more than two receipts signed, but that could happen.

Q Are there any labels placed by ITO on a lot of cargo after it is received on a pier?

A Yes, sir. A checker places a label which shows the port, the ship's name on it, plus the dock receipt number and the number of pieces.

Q Where does he get the information for that label?

A From his receipt.

Q From the dock receipt?

A Yes, the dock receipt and what he checks, what he tallies off the truck.

Q In other words, if the dock receipt said the MORGENSTER, he would put MORGENSTER on the label?

A Yes, sir, that's right, sir.

Q And he would also get the port of destination from the label?

A That's correct. Normally the label is

stamped up ahead of time for the ship.

Q Do you know the loading and sailing dates of either the NEDERBURG and the MORGENSTER in March of 1974?

A I gave it in my deposition, but I believe the sailing of the MORGENSTER was on the 16th and on the NEDERBURG the 24th, I believe.

Q And were these ships being loaded up to the date they sailed or up until the time they sailed?

A The NEDERBURG I'm not too sure of.

On the MORGENSTER, the MORGENSTER finished actually early morning of the 16th, if I recall.

Q The 16th of March, 1974?

A Right.

Q And then she sailed?

A I think she sailed around -- I happen to look it up myself. She sailed around 6:20 a.m., I believe.

Q And you were loading the MORGENSTER up until that time?

A Yes, sir. Not up to 6:20, no, sir. We finished before that.

Q But you were loading the MORGENSTER on the 16th?

A I believe the last -- this I would have to check my own records, sir, for gangs, what time the last gang got off.

Q Would that notation be on any kind of a document?

A No, sir. It would only be in my own personal records, ship records, of which South African Marine would have a copy of. Captain Palmer would have a copy of that.

MR. DALEY: Your Honor, I believe that one of the stowage plans has been marked in evidence and it was the NEDERBURG that everybody has stipulated to.

Is my assumption correct?

MR. DE ORCHIS: That is ITO's stowage plan.

THE MAGISTRATE: The NEDERBURG stowage plan is Exhibit C for the defendant.

The MORGENSTER stowage plan is Exhibit F for identification only.

MR. DALEY: For the MORGENSTER.

Q Sir, I show you a document, and ask if you can identify that document.

(Handing.)

A Yes, sir. It is a finished plan of the MORGENSTER.

Q Who prepares this document?

A Our plan clerk, Don Murray.

Q And who is he in the employ of?

A He is in the employ of ITO.

Q Is this document kept by ITO in the ordinary course of business?

A We always keep a copy of it, yes, sir.

Q And is it the ordinary course of business of ITO to keep a copy of that document?

A Yes, sir.

MR. DALEY: I would mark that into evidence under the original designation of Exhibit F.

THE MAGISTRATE: Any objection?

MR. DE ORCHIS: No objection.

MR. KOCHENDORFER: No objection.

THE MAGISTRATE: Since there is no objection, it may be received, but I am still puzzled as to what purpose you are offering it.

Will I learn shortly?

MR. DALEY: I am offering it because Mr. Kochendorfer made a big issue at Mr. Beauchamp's deposition and he says show me where that lot of cargo is and show me where that lot of cargo is, and the basic purpose of just introducing the documents is just to show that a loading plan or a stowage plan is just a general arrangement.

MR. KOCHENDORFER: And it doesn't show the information that we asked for.

THE MAGISTRATE: I think we could have gotten everybody to stipulate earlier that neither of the stowage plans involved specifically revealed the location of any of the cargo originally consigned to the Elgie, either the 11 containers or 11 cartons that were delivered or the one crate that wasn't.

MR. DALEY: Do you mean the MORGENSTER, sir?

THE MAGISTRATE: I mean neither plan, neither the MORGENSTER or the NEDERBURG shows any of the cargo.

MR. DALEY: Okay, your Honor.

THE MAGISTRATE: Is that not so? Don't we all agree to that?

MR. DE ORCHIS: That's correct.

MR. KOCHENDORFER: Yes.

MR. DALEY: Your Honor, I would agree to your Honor's statement with the inclusion in the stipulation that the cargo stowage plan is not a representation that a specific bill of lading is loaded aboard, a specific dock receipt is loaded aboard or a specific lot number is loaded aboard a specific vessel.

THE MAGISTRATE: I am not sure that that is true in all cases.

I think certain of the cargo that occupies a lot of space is often designated on the stowage plan descriptively and even sometimes by voyage or bill of lading number. But smaller lots of cargo, and specifically the cargo we are talking about, doesn't appear on either stowage plan.

Is that correct?

I will ask the witness that.

THE WITNESS: Specifically, yes.

THE MAGISTRATE: But some cargo is specifically displayed.

THE WITNESS: Yes.

THE MAGISTRATE: Large shipments.

MR. DALEY: If the attorneys for the plaintiffs will stipulate that in relation to this shipment it is just a general arrangement of the cargo that is on board the ship --

MR. KOCHENDORFER: No, that is not what we are stipulating to.

THE MAGISTRATE: No.

Let me have it here for a second.

MR. DE ORCHIS: I believe your Honor stated it correctly; neither shipment is on there.

MR. KOCHENDORFER: I will stipulate that neither one shows the cargo in question on board. I will stipulate to that.

THE MAGISTRATE: That aspect we all agree to, that you can look at both stowage plans forever and never find any of the cargo, either that which was delivered or that which wasn't delivered.

MR. DALEY: Okay, fine, your Honor.

THE MAGISTRATE: But we should observe that some of the cargo which has been stowed is identified both by port of origin and port of destination, and in some instances by description of the cargo and also by the weight of the cargo, and some of it is identified only in a very general sense. But some of it has numbers. It says H/L numbers.

What is H/L?

MR. KOCHENDORFER: Heavy lift.

THE MAGISTRATE: I don't see any bill of lading numbers anywhere in here, but I see what may be invoice numbers in some places, long, lengthy numbers.

What do they represent?

THE WITNESS: That represents the container numbers.

THE MAGISTRATE: It seems from looking at it that most of the cargo is identified descriptively, which is to say, truck parts, bags of flour, cellulose film, things of that nature.

But there are occasional entries saying various material, general cargo, things of that nature.

So in some instances you would be able to find specific cargo because it is described in the stowage plan, and in other instances you would not be able to find it, particularly if it was fairly small cargo and not described. But we all agree that in neither of these stowage plans, is any of the cargo, either that delivered or not delivered, listed.

MR. DALEY: Specifically listed.

THE MAGISTRATE: Yes. It may be in there described as crates or cartons or whatever.

We all agree on that? No question about that?

MR. MULROY: Yes.

MR. DE ORCHIS: Yes.

MR. KOCHENDORFER: I don't think we can

agree that the case is included in there, because it is our contention that there isn't even -- it is our position that not only could it be disguised in there, it is not there either disguised or not disguised.

THE MAGISTRATE: Your position is that neither stowage plan has any anonymous crates listed?

MR. KOCHENDORFER: Yes.

If it would clarify the problem, your Honor, at the deposition of the witness here -- and I think the reason for the discussion here -- a hatch tally was provided which showed one case on it.

It was my position that none of the items on the hatch tally were reflected on the cargo plan, none of them, even the large items, and, therefore, I can't agree as to what is shown and what is not shown. I say it has to speak for itself.

THE MAGISTRATE: All right. But you can say there is no affirmative indication here which says that it is the crate of optical equipment that is missing?

MR. KOCHENDORFER: Correct.

THE MAGISTRATE: All right. Let us leave it at that and move on.

MR. DALEY: Is that accepted into evidence, your Honor, the second one?

THE MAGISTRATE: Yes.

xxx (Stowage plan received and marked Third Party Defendant's Exhibit F in evidence.)

BY MR. DALEY:

Q Mr. Beauchamp, during the loading of a South African Marine vessel, do you coordinate any of your activities with somebody in the employ of South African Marine themselves?

A Yes, sir. Captain Palmer.

Q And what is his position with South African Marine?

A Captain Palmer is a senior marine superintendent.

Q Do you get instructions from him as to how to load the vessel?

A Not to load a vessel. We get instructions talking about port distribution, where to put the ports, that's all.

Q He tells you Durban load six tons upper [illegible]eendeck --

A No, sir. He just specifies the compartment and the port.

Q Which compartment are you talking about?

A If it is an upper tweendeck, say forward, he would say Durban. We only go on specifications on containers and heavy lifts.

Q Are these instructions that you get, are they written or are they oral?

A No, sir, it is verbal.

Q Does Captain Palmer tell you, "I want a specific dock receipt loaded in a specific place"?

A No, sir. The only thing that Captain Palmer does at the initial outset of the vessel, before the vessel starts, he draws off a little plan showing the ports where we will stock.

Q And does he leave it up to ITO to stock the specific compartment -

A With that port, yes.

Q Who makes the final determination when to stop cargo activities on a South African Marine vessel?

A South African Marine, sir.

Q Would that be Captain Palmer?

A I think Captain Palmer checks with the traffic department on it or they work together on it. I don't know.

Q And then they notify you to shut down the MORGENSTER, say, for example?

A They notify us to hold, yes, sir.

Q In relation to the MORGENSTER and the NEDERBURG in March of 1974, did you in your position as pier superintendent ever give any written or oral assurances to South African Marine that a specific lot of cargo was loaded aboard a specific vessel?

A No, sir.

Q Sir, I show you four documents, and ask if you can identify these documents.

(Handing.)

A These are loading -- well, actually a loading list, or we have called it tallies but it's loading list, that are supplied by the stowage checkers that we have checking the stowage, sir.

Q And these people are employed by whom?

A ITO, sir.

Q And is this document kept by ITO in the ordinary course of business?

A Yes, sir.

Q And is it the ordinary course of business for ITO to keep these documents? Would they normally keep them?

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A At the Brooklyn Army Base we do, yes.

MR. DALEY: I would have that marked as Third Party Defendant's Exhibit H.

MR. KOCHENDORFER: I am going to object to their entrance in evidence as a document kept in the ordinary course of business, because Mr. Beauchamp testified at his deposition that he did not know where they came from and they were just produced at his request and who produced them or where they came from he didn't know.

THE MAGISTRATE: Would you like a voir dire on this at the present time?

MR. KOCHENDORFER: No. That is why I am objecting.

THE MAGISTRATE: I don't have his deposition before me. His deposition isn't in evidence. Consequently, whatever he may have testified to then is no grounds for objection, you are going to have to voir dire him to establish it.

MR. KOCHENDORFER: All right, I will voir dire him.

VOIR DIRE EXAMINATION

BY MR. KOCHENDORFER:

Q Did you testify at the deposition at the deposition at the office for the attorneys for the defendant?

A Yes, I testified at the deposition.

Q And did you testify with respect to these hatch tallies?

A Yes, I did, as to what the location was, like Number 6 hatch.

Q Were you asked at that time where they came from?

A I don't remember, sir.

THE MAGISTRATE: While he is looking for that, will the reporter mark these for identification.

xxx (Hatch tallies marked Third Party Defendant's Exhibit H for identification.)

MR. DALEY: Your Honor, in each case, this man testified that the tallies there were made by a stowage checker who was in the employ of ITO.

THE MAGISTRATE: Mr. Kochendorfer is conducting a voir dire. Let him find what he is looking for, if he can find it.

MR. DE ORCHIS: While Mr. Kochendorfer is searching, may I have a voir dire?

THE MAGISTRATE: Certainly.

VOIR DIRE EXAMINATION

BY MR. DE ORCHIS:

Q Mr. Beauchamp, when you testified at the examination before trial, you had these papers before you, had you not? You saw these at the examination before trial?

A Yes, yes.

Q Those particular papers, when they were put before you at the examination before trial, had they been given to you by the attorneys?

A No. These were given to me -- in fact -- that I don't remember, whether I got it from the attorney or not or I supplied it from the pier. That I don't remember.

MR. DALEY: I really don't remember it myself, your Honor.

I did request specific documents from the offices of ITO.

A I could have brought them over. I don't remember.

THE MAGISTRATE: What makes you now testify that these are the tally sheets kept by your company? How do you know that?

THE WITNESS: Because I received them and this is a normal procedure at the Brooklyn Army Base, to keep these tallies.

THE MAGISTRATE: How do you know these are the ones you received?

THE WITNESS: Because I received them from our planning clerk. He keeps a separate file on this.

THE MAGISTRATE: How do you know that these are the ones you received from your planning clerk? Do you recognize the handwriting, the form? What is it that you recognize?

THE WITNESS: I know I received these because I got the tallies myself, your Honor, from the planning clerk. He had to give them to me.

THE MAGISTRATE: You specifically remember receiving tallies on this particular shipper?

THE WITNESS: Yes. I asked him to go to his records and give me the tallies concerning the MORGENSTER and the NEDERBURG on this particular dock receipt number.

THE MAGISTRATE: And that was after the question arose about the nondelivery?

In other words, you don't normally ask for every tally, do you?

THE WITNESS: No. This was when I received -- and I don't remember when I received a letter from our claims department, I think it was, notifying me about this. That's the only time I know. Otherwise I wouldn't seek it out normally.

THE MAGISTRATE: And you then asked for it from the person who had it and you got it from the files and these are what you got?

THE WITNESS: Well, he got them out of the files, yes, sir.

MR. KOCHENDORFER: I think that is substantially what he testified to at the time, but he didn't know who sent it over.

THE MAGISTRATE: I don't know that the name of the messenger who delivered it is of any consequence.

Have you found what you were looking for?

MR. KOCHENDORFER: I don't see it in the record. That must have been in the debate here off the record.

I will stand with what he says now.

THE MAGISTRATE: All right. They may be received in evidence as Exhibit H.

xxx (Third Party Defendant's Exhibit H for identification received in evidence.)

DIRECT EXAMINATION CONT'D

BY MR. DALEY:

Q Mr. Beauchamp, will you please look at the first page of Exhibit H and tell us what vessel it concerns.

A MORGENSTER, date 3/15/74.

Q Is there any reference in that first page referring to the MORGENSTER that refers to dock receipt Number 207?

A Yes, sir.

Q And what does it show?

A One piece.

Q One piece?

A Right.

Q And these are loading tallies, are they not?

A Yes, sir.

Q Does it show where that one piece was supposed to go into?

A Number 6 hatch, stowage upper tweendeck forward wings and square.

THE MAGISTRATE: Will you take the stowage plan for the MORGENSTER and show me the hatch in which that one piece is supposed to have gone?

THE WITNESS: Yes (indicating).

THE MAGISTRATE: The area of the stowage plan for the MORGENSTER, which is Third Party

Defendant's Exhibit F, shows in the area described on the dock receipt from New York to Durban a large list of differing cargo, most of which identified -- some of which identified generally, such as seven packages special --

MR. KOCHENDORFER: Your Honor, can I ask that we put on the record the specific listing that is in the cargo plan and the specific listing that is on the hatch tally?

THE MAGISTRATE The hatch tally doesn't break them down in the same nomenclature.

MR. KOCHENDORFER: The point is, even when you match them up, they don't match anyway.

THE MAGISTRATE: That is what I am attempting to do now.

MR. KOCHENDORFER: That's why I would like to have both in the record, the whole list.

THE MAGISTRATE: I think it is too lengthy to possibly try and do, but I will ask the witness.

Under these various categories of cargo listed here, which includes 13 cases machinery, 56 cartons of parts, seven packages special, et cetera, under which of those headings would you say that dock receipt 207, one part, which of these headings do you contend that that is listed under, if any?

Would that be one of the 56 cartons of parts despite the fact we are told it is a crate, or would it be one of the 13 cases of machinery, despite the fact it is listed here as parts, or can't you tell?

THE WITNESS: Whether it is under the 56 cartons, I don't know, sir.

THE MAGISTRATE: You can't draw a connection between the stowage plan and the hatch tally as to this particular item?

THE WITNESS: As to the particular item, no, sir.

MR. KOCHENDORFER: Your Honor, I would again request that none of the items on the hatch tally can be matched up against the items on the cargo plan.

THE MAGISTRATE: You are saying that none of the other ones appear?

MR. KOCHENDORFER: No.

THE MAGISTRATE: You are suggesting the entire tally is wrong?

MR. KOCHENDORFER: Yes, sir.

MR. DALEY: Your Honor, that, as far as I know, that is just one tally for Number 6.

There are a whole stack of tallies here. If Mr. Kochendorfer --

MR. DE ORCHIS: Not only that, you Honor, you will notice that is the tally that is not signed. All the others are signed.

THE MAGISTRATE: The problem with the hatch tallies are that where it calls for description there is generally speaking no description, there are just a series of numbers which appear to be counts, in other words, the subtotals adding up to total numbers of amounts.

For one of them it says electric nets, as I read it, another one I can't read there.

MR. KOCHENDORFER: The item of 820 cartons of something, see if you can find that.

THE MAGISTRATE: There is no 820. There is a 786.

It is 786 and it is written in "cartons of" -- something -- cartons of flour, it seems to be.

THE WITNESS: I think it is fluorescent.

THE MAGISTRATE: Cartons of fluorescent, something illegible.

It could be tubes. And the hatch plan

does show 862 cartons of fluorescent tubes.

MR. KOCHENDORFER: 862.

THE MAGISTRATE: Yes.

MR. KOCHENDORFER: It is not the same.

THE MAGISTRATE: This could be part of the 862.

MR. KOCHENDORFER: This is why, your Honor, I would like the whole list to go in, because I think if you tally the whole tally and if you tally the whole cargo plan, there is nothing that matches. You can't find one item that matches.

MR. DALEY: Your Honor, I think a couple of questions to Mr. Beauchamp will clarify this.

THE MAGISTRATE: All right, go ahead.

BY MR. DALEY:

Q Mr. Beauchamp, is the cargo stowage plan just a general outline of what is stowed aboard a ship?

A Yes, sir.

Q Are the hatch tallies the specific items which are loaded aboard a ship?

A They are in general, except for -- except for the special, for example, I imagine that the man saw this one piece, the 207.

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Q That is the one we are specifically referring to?

A Yes, sir.

Q But you don't know whether he saw it or not, do you?

A No, sir.

Q This is just a document that you got from ITO's records; is that correct?

A That's right, sir.

MR. DALEY: I again move to admit this into evidence, your Honor.

THE MAGISTRATE: It has already been admitted, according to my recollection.

MR. DALEY: I am sorry, your Honor.

Q Mr. Beauchamp, can you please turn to the second page of Exhibit Number H.

What vessel does that concern?

A The NEDERBURG.

Q And on what date?

A 3/22/74.

Q Is that also a hatch check or a hatch tally?

A Yes, sir, a list of cargo.

Q Does it show any cargo which was loaded aboard on the dock receipt Number 207?

A Yes, sir. Two pieces.

Q Could you please turn to the next page.

I ask you, what date is that hatch tally for?

A 3/23/74.

Q And what vessel is it for?

A NEDERBURG.

Q And does it show anything on there for dock receipt Number 207?

A Five pieces.

Q And I ask you on the next page, the last page, page Number 4 of Exhibit H, is that also for the NEDERBURG?

A Yes, sir.

Q And what date is that tally?

A 3/24, sir.

Q And is there any notation on there for dock receipt Number 207?

A Four packages.

Q Mr. Beauchamp, are you familiar with the procedures followed in relation to a dock receipt?

I think you have already described them.

I mean, you are basically familiar with the issuance of a dock receipt.

A Yes.

Q You testified that one is kept by ITO, one is sent to the planning clerk, one is given to South African Marine and one is given to the trucker; is that correct?

A That's right. That's the normal procedure, sir.

Q Sir, I show you Defendant's Exhibit E, which has already been marked in evidence, and ask if you can identify that document.

(Handing.)

A The number 207, dock receipt Number 207, and it is for the MORGENSTER for Durban.

Q Is that ITO's copy of the dock receipt?

A Yes, sir, it appears to be, sir.

Q And you said a copy of this dock receipt is forwarded to South African Marine; is that correct?

A A signed copy, sir.

Q A signed copy?

A Yes, sir.

Q Are all dock receipts, in other words, this dock receipt which was marked as Defendant's Exhibit E and says the MORGENSTER, would this dock receipt be forwarded to South African Marine with all the other MORGENSTER dock receipts?

A The procedure would be that it would go there, yes, sir.

Q At your deposition, did Mr. Starrer ask you to examine your files and find out which vessel this dock receipt was listed under?

A Yes, sir.

Q And did you examine your files?

A Yes, sir. I had the chief receiving clerk pull it out of his file, out of the records.

Q And what file did he get it out of?

A MORGENSTER.

Q Did you, as a pier superintendent, give any assurances, either written or oral, to South African Marine that this specific lot of cargo was loaded aboard a specific vessel?

A No, sir.

Q Based upon your experience and the documentation which has been marked into evidence, is it your opinion that one package was loaded aboard the S.S. MORGENSTER?

A Our records indicate that, sir.

Q And, furthermore, based upon your experience and the documentation which you have reviewed, is it your opinion that the remaining 11 were loaded aboard the S.S. NEDERBURG in March of 1974?

A Our records disclose that, sir.

MR. DALEY: That's all I have right now.

THE MAGISTRATE: Cross-examination.

MR. KOCHENDORFER: Mr. DeOrchis says I don't have a claim against them so I don't have a right to cross-examine.

THE MAGISTRATE: I think you have a right to cross-examine, but I think he goes first.

CROSS-EXAMINATION

BY MR. DE ORCHIS:

Q Mr. Beauchamp, I wanted to call your attention to these four tallies.

Let us take a look first at the tally of 3/24/74.

(Handing.)

Do you know who wrote the red ink marks on that tally?

A Do I personally know?

Q Yes.

A No, sir.

Q Do you know why an asterisk was put next to the item that refers to the 307/12 shipment, the red asterisk?

A No.

MR. DALEY: 307 or 207?

MR. DE ORCHIS: 207.

Q In the first column, those numbers that appear in the first column, what are they?

A Dock receipt numbers and the amount on the dock receipt, the number of packages.

Q In the second column, there are numbers in a circle. Do you see them?

A Yes, sir.

Q What does a number in a circle mean to a tally man?

A The number in the circle is the one that he puts down. In other words, if you take the 173 on 4, he circled 4.

If you take the next one, 201 on 17 shows 9, he circled 9.

So obviously there are eight packages left.

Q Let us take the circle 9 here and this 9 does not have a circle, right next to it, right? We have two 9's for this 201/17.

A Yes.

Q Tell me, the 9 in the circle, what does that mean?

A I don't know. I mean, I can assume --

Q What does the 9 without a circle mean?

A That I don't know.

Q Now let us go down to this shipment.

You have 3 in a circle, right?

A Yes.

Q And next to it you got 3 without a circle.

A I don't know why that was placed that way.

Q Isn't that all in black ink that we are looking at? What we looked at so far was all in blue ink, right?

A Yes, sir.

Q And the checker's signature is in blue ink?

A Yes, sir.

Q Going back to 201/17, does this 9 and the 9 mean that nine were loaded?

A I would say yes.

Q Now let us go to the 3 and 3.

Does this 3 and 3 mean that three were loaded?

A That I don't know.

Q Do you know why somebody changed it to 4?

A No, sir, I don't.

MR. DALEY: Your Honor, this whole point

is moot.

Mr. DeOrchis has already admitted that there were 11 packages loaded aboard the NEDERBURG. This is the NEDERBURG hatch tally he is talking about. He has already admitted there were 11 on board and the plaintiff has admitted receiving 11.

MR. DE ORCHIS: I am admitting there were 11 on board, but I am not buying these hatch tallies for a minute.

THE MAGISTRATE: Can the witness read what is written in red ink next to the 4? I can't read it.

THE WITNESS: Looking at it, it looks like 4 packages.

I can't read that.

Q Do you see the word next to package, can you read that?

A No.

Q Incidentally, is this the checker's signature?

A Yes, sir.

Q The hatch tally is supposed to be signed by a checker?

A Yes, sir, it is supposed to be signed.

Q Without a signature it doesn't mean

anything, does it?

MR. DALEY: I object to that, your Honor. He is asking --

THE MAGISTRATE: Sustained. It is argumentative.

Q I show you the tally of 3/22/74.

(Handing.)

Is that signed by a checker?

A Yes, sir.

Q I show you the tally of 3/23/74.

Is that signed by a checker?

MR. DALEY: I would appreciate it, Mr. DeOrchis, if you refer to the vessel when you are talking about the tally.

MR. DE ORCHIS: Those are all NEDERBURG.

Q All signed by a checker?

A Yes.

Q I now show you the so-called MORGENSTER tally made in pencil.

Is it signed by anybody?

A I don't see any signature on the tally.

Q We will go back to these columns now.

Now we are looking at the MORGENSTER.

In the first column it says 1 for the

amount? Am I correct?

A Right.

Q And next to it it says 1, again? Am I correct?

A Right.

Q That would mean one was loaded?

A Yes.

Q But it says parts, doesn't it, p-a-r-t-s, parts?

A It looks that way.

Q And the crate that was missing was not a crate of parts, was it, it was the grinder?

MR. DALEY: Your Honor, this man doesn't know. He didn't prepare this document.

THE MAGISTRATE: Sustained.

Q Do we agree the word says "parts"?

A It looks to be like parts. I don't know.

Q Let me ask you this:

If you have a shipment of one great big crate and 11 little boxes and you are going to load the MORGENSTER and you have a lot of cargo for the MORGENSTER and somehow you manage to get this one great big crate --

MR. DALEY: I object to his qualification --

THE MAGISTRATE: He hasn't finished the question yet.

Q -- he manages to get the one great big crate on the ship, okay, out of this shipment of 12 and now you got 11 little boxes, as a pier superintendent, could you tell me whether an effort would be made to get the 11 little boxes also on board the same ship rather than split up the shipment?

MR. DALEY: Objection, your Honor. Little and big, there has been no testimony how little these cases were or how big they were.

THE MAGISTRATE: We will amend the question to indicate that the crate is about the size of the 11 cartons put together. That is my recollection from weight, is it not?

Let us take a look at the dimensions.

MR. KOCHENDORFER: The dimensions of the case were about five foot high by about five foot wide.

The tri-wall cartons are about two by three.

THE MAGISTRATE: Feet?

MR. KOCHENDORFER: About that, sir, yes, sir.

THE MAGISTRATE: All right. You now understand what we mean by big. We mean five by five by six and the others are two by two by three.

MR. KOCHENDORFER: Something about that size.

BY MR. DE ORCHIS:

Q Do you understand my question?

A I understand what you mean, but I really don't know how to answer you.

Q Is it good practice to split up a shipment where you are going to put one case on one ship and leave 11 others for another ship when the 11 others are very small?

A I would say the possibility -- and this I would say without knowing -- the possibility that the one case, for example, only fit on the pallet and that there was another pallet with the 11 cartons.

Q These labels that you talked about that you put on the shipment, is that a label on the shipment or a label on every single package in the shipment?

A Normally it is put on a draft, which is a pallet.

Q These are platform cards?

A It's stickers.

Q With --

A Glue.

Q Are they glued on one of the packages?

A Yes.

Q Of the shipment?

A That normally -- that I wouldn't --

MR. DALEY: The witness didn't say one package of the shipment, he said on each pallet.

Q You don't even know that these were on pallets, now, do you?

A I don't know, no, sir.

Q So let us forget about the pallets.

A Right.

Q You got 12 packages, and all I am asking you is, isn't it true if you got 12 packages and you got one label, you are going to put that label on just one of the 12 packages?

A Not necessarily.

Q All right. What else?

A In other words, these are normally taken off on pallets from the tailboard of the truck. Pallets are put there. We don't backpile on the back.

In other words, we don't take it off and stack it on the dock.

Q You are talking about the small packages?

A Anything.

Q I am still trying to give you my question.

Even if you put these small things on the pallet, the 11 on the pallet, which you don't really know that you did, the label would be on either the big box or it would be on that pallet of the 11?

A That I don't know.

Q You don't even know --

A It could be on the two.

Q And there could be there was no label? It could be?

A I don't know.

Q You don't know --

A I didn't see it. I don't know.

Q If assuming somehow this big crate got on the MORGENSTER out of this shipment of 12 and the 11 little boxes remained on the pier, you now have a split shipment on your hands, haven't you?

A Yes, if one went on one ship and the 11 went on the other one, it would be a split shipment.

Q A split shipment on your hands, do you think a stevedore ought to tell a carrier that they got a split shipment on their hands?

A Normally it would be done.

Q If you don't tell them, they are going to issue a bill of lading for the whole 12, aren't they?

A I would assume if they are not notified in the meantime. I don't know whether they were notified.

Q And if they issue a bill of lading for the whole 12, they are going to issue a manifest for the whole 12, aren't they?

A I don't know anything in regard to the bill of lading or manifest, sir.

Q Would you agree with me as an experienced superintendent of piers that if you got a split shipment, it is important to tell the carrier?

A It is important, yes, sir.

Q Will you show me the evidence where you told the carrier that this was a split shipment?

MR. DALEY: If you have it.

A I don't have it. I don't know.

Q Thank you.

THE MAGISTRATE: Mr. Kochendorfer, your turn.

CROSS-EXAMINATION

BY MR. KOCHENDORFER:

Q When a decision is made to leave some cargo behind on the pier, who makes the decision which specific cargo is left?

A It depends on the circumstances. The decision is made by South African Marine, sir.

Q In the circumstances that we had here, do you know who made the decision?

A It always comes from South African Marine.

Q Do you have the cargo plan for the MORGENSTER in front of you?

A Yes, sir.

Q Will you look at the hatch tally that you have for the MORGENSTER, which was marked as an exhibit, and could you tell me, are there seven packages of special cargo on the hatch tally?

A I couldn't tell you because I don't know what receipt it applies to.

Q Are there other hatch tallies with respect to this upper tweendeck forward wings and square?

A I don't know. I mean, I don't have the --

Q Did you make the selection of the one?

A I was asked to bring this and I brought it over, you know, in reference --

Q I said, did you make the selection of the one? Did you go through the tallies and pick the one out?

A No, sir.

Q Who did that?

A The plan clerk.

Q And they only sent you one?

A They only gave me the one on this basis, yes, sir.

Q Do you know who made out that tally?

A We[illegible] I had this tally since -- there is no name on it.

We verified that the checker was A. Santisi.

Q The third item on the hatch tally, which is an 820 circled, does that mean 820 are aboard?

A By looking at it I would say so.

Q Can you show me in the plan where there were 820 cartons of anything.

A No. The only thing I see on the plan are 862 cartons.

Q There is a discrepancy, then, between the 862 and the 820, then?

MR. DALEY: Your Honor, Mr. Kochendorfer is assuming.

THE MAGISTRATE: Sustained. There may be an additional tally sheet with the remainder on it.

MR. KOCHENDORFER: That is all the questions I have.

THE MAGISTRATE: I have a couple of questions for the witness.

You suggested that perhaps the explanation for the larger crate having been loaded on the first vessel and the smaller cartons not having been loaded was that the smaller cartons may have been palletized at the time of their receipt and, therefore, collectively have been as big or bigger than the crate; is that correct?

THE WITNESS: I don't know the size of the tally, I mean, the cartons, sir.

THE MAGISTRATE: You did suggest the possibility they were put on a single pallet.

Will you look at the tally sheets for the NEDERBURG and see if it doesn't indicate that the cartons came aboard in at least three different crates?

THE WITNESS: Yes, sir.

THE MAGISTRATE: Wouldn't that indicate to you, then, that they couldn't all have been put on the same pallet, or if they were, they were subsequently split up?

THE WITNESS: It could have been they were subsequently split up. That I don't know, sir.

THE MAGISTRATE: It would be unusual if you went to the effort of palletizing the cartons to split them up later on, would it not?

THE WITNESS: I'm afraid I agree, sir.

THE MAGISTRATE: You were present when the witness from South African Marine testified about the manner in which they learn about shut out cargo, were you not?

THE WITNESS: I was in on part of the testimony, yes.

THE MAGISTRATE: He testified, in essence, that after each ship leaves, he gets an envelope full of dock receipts from ITO for cargo that was completely shut out, and he also gets in that envelope dock receipts for cargo that was partially shut out, in other words, split shipment, and that he can tell one from the other because of handwritten entries made on ITO's copy of the dock receipt.

Will you let me have the one he gave as an example?

MR. DE ORCHIS: Yes, your Honor.

(Handing.)

THE MAGISTRATE: I am showing you now Defendant's Exhibit F, the second page, which is a dock receipt with some penciled notations, the first being an indication that certain packages went on the MORGENSTER and that certain other packages went on the NEDERBURG.

Is that, in fact, done by ITO?

THE WITNESS: I wouldn't know, sir.

THE MAGISTRATE: You don't know what the system is for notifying the shipper of split shipments?

I mean the ship line of split shipments, not the shipper.

THE WITNESS: The mechanics are done in different ways, sir. I really don't get involved in that.

THE MAGISTRATE: Do you know whether any written notification was sent to South African Marine of whether there had been a shut-out or a split up shipment?

THE WITNESS: I don't know, sir.

MR. DALEY: I have a few more questions.

REDIRECT EXAMINATION

BY MR. DALEY:

Q Mr. Beauchamp, Mr. DeOrchis for South African Marine asked if you had personal knowledge if labels were put on each of these cartons, and you said "I don't know."

But what is the normal procedure of ITO? Is it to put a label on the cartons?

A It's not to put on each carton, it would be to put on, if it is a pallet of cartons, to put it on that.

Q So if you had four pallets, you probably would have four labels; is that correct?

A It could be, or the four pallets could have -- the last pallet would have the label on it, you know. But normally each label is put on each pallet.

Q Normally it is?

A Right, sir.

Q Does ITO have anything to do with the issuance of the bill of lading or the making up of the manifest?

A No, sir.

Q Has anybody in South African Marine or did anybody in South A;rican Marine, in March of 1974, request hatch tallies for either the MORGENSTER or the NEDERBURG?

A I don't know. Not of me. They didn't request them of me.

Q They didn't ask them of you?

A No, sir.

Q And you are the man in charge of the pier; is that correct?

A That's right, sir.

Q If I wanted to know what went on a specific ship, wouldn't the hatch tallies be the best thing to tell me what went on a ship?

A Yes, sir.

Q I mean, it would be better than a bill of lading, wouldn't it?

A Yes, sir.

Q Okay.

Have you ever conducted pier tallies? After a ship leaves, have you ever conducted pier tallies?

A By pier tallies you mean looked at them?

Q Yes. Find out what is left on the pier after a ship leaves.

A I personally? No, sir.

Q Has ITO ever been requested to do it?

A Certain times, yes, sir.

Q Has South African Marine ever requested that ITO do it?

A Captain Palmer has requested at certain times to have the dock checked back, sir, yes, sir.

Q It has already been established that there were amounts of cargo that was shut out of the MORGENSTER.

Don't you think it would be a good idea if cargo was hut out of one ship to find out exactly what is left for the next?

A Yes, sir.

Q And don't you think a pier tally would be one of the best ways to find that out, an actual pier check as to what is on the dock?

A Yes, sir.

Q Yet to your knowledge, did South African Marine ever require a pier tally for either the MORGENSTER or the NEDERBURG?

A I don't know, sir.

Q To your knowledge, yes or no? Just a yes or no answer. Did they ever request that a pier tally be conducted after MORGENSTER left or after the NEDERBURG left?

A I just don't know, I mean.

MR. DALEY: That's all.

RECROSS-EXAMINATION

BY MR. DE ORCHIS:

Q Mr. Beauchamp, if you say you don't understand these tallies, do you think somebody at South African Marine would understand them if you sent them over?

I am talking about, can you honestly say that you can look at these tallies and tell me what was loaded and what was not loaded on the ship? You really can't, can you?

MR. DALEY: I object, your Honor. The documents speak for themselves.

THE MAGISTRATE: Oh, no, they don't.

Besides being illegible in part, they are very vague as to what they concern, and the witness is being asked a fair question.

Read it back to him.

(Question read.)

A I can tell by the receipts that are shown. As to the amount, I can't answer that.

Q What do you mean the receipts that are shown?

A The receipt numbers are shown on the side.

Q In this column (indicating)?

A No, sir.

Q These are just the dock receipt references?

A That's right.

Q But you can't tell what was put on the ship from these tallies?

A Well, I assume the numbers alongside of what was stowed on the ship.

Q But we have a situation where the numbers alongside don't agree, because you --

A I see that, sir.

Q All right.

The other question I wanted to ask you, when you split a shipment and you put one box on the ship, that box has now left your custody, has it not, as a terminal operator?

A It has been loaded, yes, sir.

Q Let us take this shipment.

Suppose one box went on the MORGENSTER, up to the minute the MORGENSTER sailed, you were responsible for 12, but now you put one on the MORGENSTER and one is gone, right?

A Yes, sir.

Q Don't you have to protect yourself in some way to be able to make a record that you put one box on that MORGENSTER so that you won't be held responsible for it? I am talking about now terminal operations.

A As I said before; sometimes there is a dock check. I don't remember whether there was a dock check done on the MORGENSTER.

Q After a ship sails, doesn't the terminal operator make a check to see if anything has been shut out?

A Normally we check only on the appearance of the freight that is left on the dock to make sure that we got most of the freight in the ship, in other words, all that was consigned to the ship, yes, sir.

Q And after the ship sails, do you check to see what is left to see if anything has been shut out?

A If it's a large amount, most times we do, yes, sir.

Q And when you make a record of what has been shut out, don't you send a carrier a dock receipt showing him what has been shut out?

A That I -- that I don't know I mean, the actual mechanics of the receiving office, of how they -- what they do with South African Marine.

Q But you do agree that as a pier superintendent it is good practice after a ship sails for the marine terminal operator to advise the ocean carrier of what has been shut out?

A Well, normally it is requested.

Q If you lose a box on the pier while it is in your custody, you are going to be responsible for it, aren't you, if it is stolen from you?

MR. DALEY: That is a legal question, your Honor.

THE MAGISTRATE: Let me put the question to the [illegible] this way:

The ITO witness testified that they determine what cargo has been shut out solely on the basis of dock receipts returned to them -- I am sorry, I will start all over again.

A South African Marine witness testified that they know what cargo has been shut out and left behind on the pier solely by the dock receipts returned to them by ITO.

Your attorney has asked you whether it

would not be a better practice to do an actual pier inventory as to what was left on the pier. You have agreed that it would be.

We know that when the MORGENSTER sailed in March of 1974 there was considerable cargo left on the pier. That cargo at that point remained in your custody.

Why, if it is a better practice, then, did you not do a pier inventory as to what cargo had been shut out of the MORGENSTER?

THE WITNESS: Well, I don't know whether there was a pier inventory on the MORGENSTER definitely. I personally don't know.

THE MAGISTRATE: You think it would be a good idea, but you don't know whether it was done?

THE WITNESS: I don't remember, sir.

THE MAGISTRATE: Do you have any documents that could tell you?

THE WITNESS: No, sir, I have no documents.

THE MAGISTRATE: Have I covered the point you were getting at, Mr. DeOrchis?

MR. DE ORCHIS: Yes, sir.

THE MAGISTRATE: Are you through with this witness?

MR. DE ORCHIS: Yes, I am, your Honor.

MR. DALEY: I just have one further question.

REDIRECT EXAMINATION

BY MR. DALEY:

Q On the first dock receipt or tally by the MORGENSTER which has been marked as Third Party Defendant's Exhibit H, the dock receipt Number 207, do you have any trouble reading that number? Is there a number there?

A Yes, sir.

Q What is the number?

A 207/12.

Q And that is the dock receipt number?

A Yes, sir.

Q And is there a number of cases that they are talking about or whatever?

A There is one piece.

Q Okay. One piece.

Do you have any trouble reading that number?

A No, sir.

Q Okay. Even a steamship carrier could read that number and understand that it means one?

A Yes, sir.

MR. DALEY: That's all I have.

THE MAGISTRATE: All right. You are excused.

(Witness excused.)

THE MAGISTRATE: Next witness.

JOHN FRANCIS FLYNN, called as a witness by the third party defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MULROY:

Q By whom are you employed, Mr. Flynn?

A By International Terminal Operating Company.

Q And what is your job with them?

A Receiving clerk.

Q Where do you work, what pier?

A 2.

Q And what is your job as a receiving clerk?

A Well, to compile all the tonnages for the day, answer the phone with different inquiries that may come in when they can bring on cargo, when they can hold on the pier, et cetera.

Q You are familiar with the receiving and loading and ITO practices; is that right?

A Yes, I am.

Q Are you familiar with their tally procedures?

A Yes. I have a working knowledge. I'm not involved, but --

Q I show you a document, as a matter of fact, I am going to show you several documents which have been marked, all dock receipts, different forms.

Here is Plaintiff's Exhibit Number 4 in evidence. This is the shipment that is involved in this lawsuit, Mr. Flynn.

(Handing.)

Do you have any personal familiarity with that shipment? Do you have any personal knowledge about it?

A Well, can I just go on and talk and then be interrupted, I mean, to explain it, because I have heard --

Q I have no objections if my adversary doesn't object.

A What happened here is the truck come in with 12 pieces.

You people have all said the crate was larger so that was taken down the pier by one machine. The 11 cartons on one or three pallets, as you said, were taken down by another machine.

They became separated.

The one crate went on the MORGENSTER, which has been established by the planning clerk. But the information I got, everything was gone. There was no notification to be shut out because this never was shut out.

Q As far as you were concerned, it was all supposed to go on the MORGENSTER and you had received no knowledge of anything otherwise; is that correct?

A Until a week later this was gone on the MORGENSTER according to my records.

Q Do you remember receiving a request with regard to shipments which partially went on the MORGENSTER and partially went on the NEDERBURG that you were supposed to make a certain compilation of dock receipts and send them over to South African Marine, something like this?

(Handing.)

A Right.

Q Do you remember that you were supposed
do that?

A Well, I used to do it, but now they have a new procedure where --

Q At that time do you remember that you sent over dock receipts on this?

A Yes.

Q Would you tell the Court why you did not send over a dock receipt on the MORGENSTER?

A Because it wasn't shut out.

Q It was not shut out?

A Nohow.

Q When did you first learn that the entire 12 items listed on that dock receipt did not go forward on the MORGENSTER?

A When they started loading the NEDERBURG and found this behind the pile.

Q What did they find behind the pile?

A The 11 cartons or whatever, 11 pieces.

Q Who found the 11 pieces; the name of the man that found it?

You are testifying from personal knowledge, you are not testifying from documents?

A No, no. Richard Reese is the location man. He come up and told me the 11 was still on the pier.

Q And this was the first time that you had any knowledge that those 11 were on the pier; is that right?

A Correct.

Q In connection with the pallets, do you know, based on the dimensions that you heard here today of the size of the crate and the cartons, if these cartons would, in the normal course of your handling, have been placed on pallets or not placed on pallets?

A Everything is on pallets, but huge items. They have to be. There is no way to move them.

Q And you mean by Hi-Lo's?

A Right.

Q On the basis of it all being on pallets, you don't know how many pallets it was on? You know there were 11 cartons on pallets, but you don't know how many pallets; is that right?

A I didn't see them physically.

Q If I were to show you three hatch tallies on the NEDERBURG indicating five cartons went in the Number 3 lower hold aft and that four went in Number 5 upper tweendeck --

MR. DE ORCHIS: Wait --

MR. MULROY: Wait until I finish.

MR. DE ORCHIS: My objection goes to the question, not the answer.

Q -- and two show Number 4 lower tweendeck in the caption of the hatch, would you explain to the

Court what the minimum number of pallets on which these would have to be placed in order to be stowed in three different parts of the ship.

A It would have to be three pallets.

THE MAGISTRATE: Hold it.

MR. DE ORCHIS: My objection to the question was that it was leading.

In fact, my friend was reading the tallies to the witness because they are unreadable.

MR. MULROY: I withdraw the question.

Q Will you look at the three tallies and tell the Court, in connection with the dock receipt I showed you, will you tell the Court the minimum number of pallets that it would be necessary for this cargo to be stowed on in order for those facts --

A Obviously it would have to be three.

Q And you say obviously because --

A They are broken -- there are three different distributions. One pallet -- they wouldn't take four off and send it to another place and take five off and send it to another, and take two off.

MR. MULROY: At this point, your Honor, in order to clarify this question, since actually it was raised by the Court, it was testified to earlier by the gentleman from South African Marine that South African Marine made the handwritten notation on their form of the dock receipt, and the particular language used is "Antony will advise, Antony said he only had stowage for" and then there is a number 11 and it is bracketed, "2 - 4 tweendeck, 4 - 5, 5 - 3 lower hold."

So it was South African Marine that determined where those 11 packages were stowed and it was testified to that this information was put on by South African Marine and it only appears on their copy of the dock receipt.

THE MAGISTRATE: What does that have to do with where the crate went to?

MR. MULROY: Your Honor, I am clarifying where the 11 went to, the fact that it wasn't shut out.

THE MAGISTRATE: Wasn't shut out?

MR. MULROY: The 11 were not deliberately shut out as a result of a cutoff of loading of the MORGENSTER cargo.

This witness has just testified that what happened was ITO had instructions to load the 12 packages on the MORGENSTER. As far as ITO knew at that time, they did load the 12 packages on the MORGENSTER.

They omitted to load the 12, they only loaded the one crate, which is involved in this lawsuit.

THE MAGISTRATE: You are making, then, a distinction between shut out, it being an intentional omission of cargo and leaving behind accidentally?

MR. MULROY: That's correct.

THE MAGISTRATE: I didn't understand your terminology.

MR. MULROY: The impression was that there was deliberately a shut out of cargo, and the question was what cargo was deliberately shut out, and it was suggested that this cargo was not on that list.

This has been brought out by Mr. Catania that this cargo was not on his list because it was shut out.

THE MAGISTRATE: The witness actually testified that it was all shut out and he knew it was shut out because ITO sent him a dock receipt with a pile under the heading of "Shut Out Cargo."

This witness has now testified that that is not so, that they didn't send anything because they thought they loaded everything, and it was only subsequently that they came across the 11 cartons which hadn't been loaded.

MR. MULROY: That's correct, your Honor.

THE MAGISTRATE: I will say, therefore, there is a very distinct factual dispute between the two witnesses' testimony.

How do you see the handwriting on the South African Marine copy of the dock receipt as bearing on that dispute?

MR. MULROY: The writing on the South African Marine bears on the authenticity and credibility of the three hatch tallies that were attacked.

I heard no attack on the tally indicating that the one crate involved in this lawsuit went on the MORGENSTER.

THE MAGISTRATE: I think you have it backward.

Nobody attacked the three tallies that are signed and concern the NEDERBURG; everybody accepted those as being accurate. They were attacked only to the extent that it was assumed that all the cartons had been placed on a single pallet, since it is apparent they went aboard in three drafts. But the accuracy of what went aboard and where it went aboard has not been questioned as to the signed NEDERBURG tallies.

It is the unsigned MORGENSTER tally which is placed in suspect both because it doesn't accurately -- it doesn't tally up with what is shown in the hatch plan and because there was no split shipment dock receipt sent forward and because it describes the crate, which it must have been if it was only one, as being parts when, in fact, it was a generator.

MR. MULROY: This witness has testified there was no split shipment dock receipt because ITO understood that they had all gone forward.

THE MAGISTRATE: I understand that. There is a very definite distinction in fact between what he has testified to and what I think was Captain Palmer -- no. Was it Captain Palmer? -- Mr. Minutello testified to as to what they received in a documentary sense from ITO.

MR. MULROY: That's right. And this is the gentleman that he testified sent the dock receipts up as to why they were the way they were.

THE MAGISTRATE: Yes. And he said he couldn't have made up the list of shut out cargo on the first ship, the MORGENSTER, had he not received that dock receipt in the pile of dock receipts from Mr. Flynn.

BY MR. MULROY:

Q Do you know of any actions on the part of ITO that would have indicated to South African Marine that the shipment did not go forward on the MORGENSTER?

A Well, I can only quote this fellow who is a location man, Richard Reese.

In any instance where anything is left behind, he calls them. Now, you would have to ask him if he called them on this. He was the one that found them and told me about the 11.

Q Reese told you that he found the 11?

A Yes.

Q And he understood the other went forward; is that right?

A Yes.

MR. MULROY: I have no further questions, your Honor.

THE MAGISTRATE: Cross-examination.

(Pause.)

THE MAGISTRATE: I have a question.

Let me show you Exhibit G, which is a list of cargo shut out from the MORGENSTER to be loaded on the NEDERBURG.

You will see it is quite long, many pages. But in the middle of it, under dock receipt Number 207, is the Copeland shipment of 12 packages.

Can you explain if you did not send the dock receipt back to South African Marine --

THE WITNESS: May I ask who prepared this?

THE MAGISTRATE: Mr. Minutello, I believe, prepared it.

THE WITNESS: That proves nothing to me. I'm sorry, I'm answering you honestly. This means nothing to me.

THE MAGISTRATE: Look at the other cargo both immediately before and immediately after it. Copeland doesn't appear to be a last-minute addition called in when something was found on the pier.

THE WITNESS: But couldn't this be prepared after the fact?

THE MAGISTRATE: No question it was prepared after the MORGENSTER sailed, but --

THE WITNESS: No. That's when we discovered it -- no, no, I beg your pardon, when the NEDERBURG came in, which would be when all of this would be gone into.

I don't see how this could go on there. Neither the South African Marine Lsne nor any of their representatives listed this to be shut out. It was not turned in as being shut out by our man that took the pier. He discovered it when they loaded the next ship accidentally.

THE MAGISTRATE: They say that it was so turned in and that's how they prepared this.

THE WITNESS: I would like to know by whom.

THE MAGISTRATE: Is there any possibility that this exhibit represents an actual dock survey or inventory of what was left on the pier after the MORGENSTER sailed?

THE WITNESS: No, because I don't recognize it. It is none of the people that would deal with me.

This has been prepared by the steamship company, not by anyone on the pier.

THE MAGISTRATE: What would they have prepared it from?

THE WITNESS: I don't know. You would have to ask them.

THE MAGISTRATE: Do you normally send them dock receipts of shut out cargo?

THE WITNESS: Yes.

THE MAGISTRATE: Did you do so when the MORGENSTER left?

THE WITNESS: We have to go back to this Reese again. You see, I thought this was his preparation.

THE MAGISTRATE: Reese was doing that at the time, not you?

THE WITNESS: Well, he went around and he prepared something similar to this, mimeographed it and sent it in.

THE MAGISTRATE: In March of 1974, who was telling South African Marine about shut out cargo, your or Reese?

THE WITNESS: Reese.

THE MAGISTRATE: And you don't know whether or not he sent them -- you say he didn't send them a dock receipt on the Copeland cargo because he only discovered it later on; is that correct?

THE WITNESS: Correct.

THE MAGISTRATE: Did he send them dock receipts for these literally hundreds of other items listed here?

THE WITNESS: Actually, we don't send them receipts, we just notify them.

THE MAGISTRATE: How do you notify them?

THE WITNESS: Either by phone or by listing. In this case it would have to be listed.

Unfortunately, nobody bothered -- it is similar to this.

THE MAGISTRATE: You would make up a hand-written list like that?

THE WITNESS: Yes. It is the best I can describe, it would be like this, but this is not it.

THE MAGISTRATE: You weren't here when Mr. Minutello testified.

He testified that he never got a list, all he got was an envelope which bore a legend on it "Shut Out Cargo" and inside had all the dock receipts.

Did you ever do it that way, send dock receipts rather than make up a list?

THE WITNESS: There was a time when we let them use ours.

I don't know if this is the time now. I don't want to commit myself. But there was a time we would send our receipts inasmuch as they had their copies. But that is long since past. We are not supposed to give our copies up.

THE MAGISTRATE: When did you stop?

THE WITNESS: There I would have to go back and look.

THE MAGISTRATE: Was it before or after Mr. Reese took over that function?

THE WITNESS: Before. That's why he took the function over, so we wouldn't have to give up our receipts, which was the only proof that we had of anything.

THE MAGISTRATE: When did Mr. Reese take over this function from you?

THE WITNESS: I suggest you ask him.

THE MAGISTRATE: Do you remember? What year was it?

THE WITNESS: Well, let's put it this way, he was doing it when this happened because he was the one telling me he found the 11, so if he had to come and tell me he found the 11, then he was already handling it or he wouldn't have come to me to say the 11 were on the pier, so it was obvious he was doing it.

Yes, he was doing it then.

THE MAGISTRATE: He was doing it then at least as of March 15th?

THE WITNESS: I didn't know about the 11 being out. If he wasn't doing it --

THE MAGISTRATE: Is Mr. Reese going to be a witness come Tuesday?

MR. MULROY: I first heard Mr. Reese's name in Court today, not on the phone, so we will arrange to bring Mr. Reese.

THE MAGISTRATE: We gradually seem to be working our way down to witnesses who know something about it.

MR. MULROY: Quite accidentally, we are getting people who have first-hand knowledge.

THE MAGISTRATE: All right. Any further questions of this witness?

CROSS-EXAMINATION

BY MR. DE ORCHIS:

Q I was going to say, Mr. Flynn, that really all you know is what Mr. Reese told you.

A Not necessarily. In this case I know he found me 11.

Q Do you run a pretty tight ship on that pier?

A What do you mean by tight ship?

Q Do you run a pier that is well-run, accurately run?

A Yes. But when they are working two shifts within a week of each other loaded with cargo, anything can happen. Everybody has overlooked that, the volume of work.

Q I was going to forgive you when you told me you found one pallet loaded with cargo hiding another load.

A I didn't say one pallet.

Q I know. But now your lawyer tells me you lost three pallets of cargo behind other cargo.

You are saying these packages are on three different cargoes, right?

A This is the truck, four pallets. The same machine driver doesn't take the cargo away.

Your three pallets of 11 pieces could very well have been stacked and taken in one move and put here and another machine come along and took the case and put it there, and with the volume of business, this got boxed in by more cargo, this made the ship, your one piece, excuse me, this got blocked in and when you got it --

Q I thought you put labels on cargo so you know where it is.

A If it is blocked, the label won't help much, will it?

So there are times when cargo could be on a pier and it might be blocked out of view.

A Many times.

Q So when these 11 cases were found on the pier, it is possible the twelfth one was blocked out of view somewhere?

A No. We had already been told the 12 -- or one of the 12 had been loaded on the pier, on the ship.

Q Who told you that?

A They have proof. They have it in the hatch, the hatch list.

Q What proof was that?

A They had it. I don't know if these papers --

Q Who is "they"?

A The plan clerk.

Q The lawyers?

A The plan clerk.

Q The plan clerk told you that?

A The first time this come up.

Q He told you that one was loaded on the ship?

A On the MORGENSTER, right.

Q And then the plan clerk would have put it on his plan, wouldn't he?

A I understood it was on the plan.

Q But it is not on the plan.

A Now, I don't know. I understood it was. There is a tally that shows that it went on.

Q The location man, he is supposed to know where stuff is on the pier?

A Yes, but not for the purposes of loading.

Q After a ship sails, who goes around to check what is left behind?

A The location man.

Q And when the location man finds some cargo has been left behind, isn't he supposed to notify the carrier?

A I'm under the understanding that he did.

Q That is what Mr. Reese was --

A I don't know why in this instance he wouldn't.

Q That is what Mr. Reese was supposed to do, notify the carrier?

A Right.

Q As quickly as possible?

A Well, I don't know the time element.

Q Before the next ship sailed.

A He couldn't do that because it wasn't

discovered until they were loading the next ship in this instance.

Q So then he didn't make a search soon after the first ship sailed?

A He did, but he couldn't go through the cargo for ship B. There are tons of cargo there. So now they start loading B and they find this. He could never have spotted this.

Q I am talking about cargo left behind.

A We established that this was blocked in by freight for the next ship, so you wouldn't assume this was left behind, you assume it is for the ship they are loading.

Q The superintendent testified --

A He wouldn't enter into that.

Q He wouldn't know about that? But the superintendent testified that you got different locations on the pier for different ships and you keep cargo separated by ships.

A We do.

Q So when the MORGENSTER was finished loading, there should be nothing left in the MORGENSTER area.

A Correct, not if it's mixed up with the

NEDERBURG freight, no. So here we are all clear here, the MORGENSTER is gone. Now we go and load the NEDERBURG and lo and behold we find the 11 that should have gone on the MORGENSTER.

Q The MORGENSTER cargo which is mixed up --

A This happens regularly. This isn't a rare instance. I mean, I am not going to --

Q All right.

A I mean, it is very possible for it. I mean, you got to go by the machine drivers are the final thing. They can't come and testify. They are told to put this here. So if they stop and get coffee and drop it off here and the next guy goes to door 50, it goes with him.

Let's face it. I mean, you can't control it. There is supervision, they are told to put it in such and such a door, but it is very easy for something to go astray.

THE MAGISTRATE: Mr. Flynn, one thing I don't understand is the number of pallets used for the cartons.

We are told that the cartons were approximately two foot by two foot by three foot, and that they weighed a couple of hundred pounds apiece.

How many pallets would it normally take to take 11 cartons of that description?

THE WITNESS: Well, it depends on the size of the carton.

THE MAGISTRATE: Two foot by two foot by three foot.

THE WITNESS: You wouldn't go more than two high. If they were two foot, you can only go four foot high. That would be the height of it.

THE MAGISTRATE: A pallet is about how big, six foot by nine foot?

THE WITNESS: Not nine foot. It is six foot by something, but I don't think it is nine foot. I mean, that I don't know. That's out of my area.

MR. DALEY: I think it is six by four, your Honor.

THE WITNESS: Nine is definitely out of order.

THE MAGISTRATE: Then that is 24 square feet.

Two by three is six square feet.

You could put, with a two level, you could put eight on one pallet.

Why did it take three pallets for 11?

THE WITNESS: Okay. Can we take another point?

Let us assume they did what you said and in doing that they dropped two cartons off, they would put it on -- no, anything is possible. I am giving you an alternative.

Let's assume they put the eight on and in doing so they knocked two off on one side and four on the other. They would put them on two other pallets. That could be it.

I don't even know the numbers. That's a possibility.

I mean, it being on three pallets doesn't signify anything is wrong.

THE MAGISTRATE: They went aboard in drafts of five, three and two.

MR. DALEY: Five, four and two, your Honor.

THE MAGISTRATE: Yes.

THE WITNESS: Let's say they put them all on one pallet and they fell off.

I don't know that this happened. I say that it is possible.

THE MAGISTRATE: All right.

Anything further, gentlemen?

MR. KOCHENDORFER: No.

BY MR. DE ORCHIS:

Q Do you know the date that Reese reported to you that he found these 11 cartons?

A It would be the first or the second day that the following ship was loading, whatever the date was. When they started to load the next ship he found them.

I mean, I don't know the dates, but it can be -- that's when they discovered the 11, when they went to load the NEDERBURG, which followed.

Q As I understand it now, they discovered these 11 missing not because they were looking for them, but because they were loading the NEDERBURG?

A Correct.

Q And in their search for the shut-outs of the MORGENSTER, they never found them?

A Well now, as they shut out the MORGENSTER they put this cargo by itself, whatever they shut out. They had to account for it.

Nobody was looking for these 11 because they weren't shut out, so for all intents and purposes they had gone on the ship.

Q How could they go on the ship, you have a tally for only one?

A Now we are going back. This doesn't come to me. I have nothing to do with this.

As far as I know, I got 12 pieces, they were received, they are no longer on the pier, the only assumption is they went on the ship. This is me now. There are other people involved.

Now, when a man comes up to me and said, "I found 11 in the wrong place," it has no bearing on the shut-out. A shut-out, the steamship company says we don't want these 11 to go. At times we even go into a ship to try to get a piece out. It is deliberately held out for a reason. These were not involved at all.

Q As a receiving clerk, you worked in an office on a pier, the receiving office?

A Correct.

Q You are not out there counting stuff on the pier or looking for it?

A No.

THE MAGISTRATE: Okay, Mr. Flynn, you are excused.

(Witness excused.)

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THE MAGISTRATE: We are concluded for the day and we will resume at 9 a.m. on Tuesday. We are going to run no later than 11 a.m., so let us make our plans accordingly.

MR. MULROY: Can we put one more question to this witness on the record?

THE MAGISTRATE: All right.

JOHN FRANCIS FLYNN, resumed.

REDIRECT EXAMINATION

BY MR. DALEY:

Q Mr. Flynn, if there is a tally conducted by somebody in the employ of ITO for March 22, 1974, would it be fair to assume that it was on March 22, 1974 or before March 22, 1974 that this shipment was found by your location man?

A What does that particular date signify? I mean, the dates right now are not clear in my mind.

Q I am just asking you a question.

If, in fact, you were notified -- supposing the MEDERBURG started loading on March 22, 1974.

A Yes.

Q If you have a hatch tally that tallies some of this shipment and the hatch tally states March 22, 1974, wouldn't your location man have to have discovered that on or before March 22, 1974?

A That's when he discovered it, when they started to load, at some point when the ship began to load.

Q So if it is March 22nd here loading this ship dock receipt, he should have known it by then, right?

A Yes.

THE MAGISTRATE: See you Tuesday morning.

(Adjourned to Tuesday, March 23, 1976, at 9 a.m.)

* * *

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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ELGIE & COMPANY,

Plaintiff,

vs.

S.S. "S.A. NEDERBURG," her engines,
boilers, etc. and SOUTH AFRICAN
MARINE CORPORATION, LTD.,

Defendant.

-----------------------------------x 74 Civ. 5112

S.S. "S.A. NEDERBURG," her engines,
boilers, etc. and SOUTH AFRICAN
MARINE CORPORATION, LTD.,

Third-Party Plaintiff,

vs.

INTERNATIONAL TERMINAL OPERATING
CO., INC.,

Third-Party Defendant.

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March 23, 1976,
9:30 a.m.

Before:

MAGISTRATE GERALD L. GOETTEL

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APPEARANCES:

BIGHAM ENGLAR JONES & HOUSTON, ESQS.,
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BY: ROBERT E. DALEY, ESQ.,
and MARTIN B. MULROY, ESQ.,
of Counsel

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THE MAGISTRATE: All right, we are on the third-party defendant's case. Why don't you call your next witness.

MR. DALEY: Mr. King.

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WILLIAM JOSEPH KING, called as a witness by third-party defendant, being first duly sworn by the notary public and stating his residence as 144 Rutland Road, Hempstead, New York, testified as follows:

DIRECT EXAMINATION

BY MR. DALEY:

Q Mr. King, where are you presently employed?

A 60th Street terminal, ITO, International Terminal Operators.

Q And how long have you been employed by ITO?

A A little better than five years at this place.

Q At this place, were you employed by ITO before that?

A I worked for them on another pier for a year, a little better.

Q In March of 1974, were you employed by ITO?

A Yes, sir.

Q Where were you employed by ITO?

A 60th Street terminal.

Q And what was your occupation, what was your job, at ITO?

A I am working in the receiving office, receiving clerk in there.

Q And what are the duties of a receiving clerk?

A Receive cargo, sign the receipts, route the receipts, extend them. Extend the measurements, make sure that everything is good.

Q And you were employed by ITO in the receiving department in March of 1974?

A Yes, sir.

Q Are you familiar with the procedures followed at the pier in relation to delivery receipts?

A The taking in receipts for cargo? Yes, sir.

Q Okay. What are the general procedures followed with delivery receipts?

A Driver comes in, hands us a mass, whatever receipts he has, we look at the ship, port of dispatch, put down the appropriate number. It looks like it should be special cargo, stamp it for the crib, route the receipt, give the driver two copies to go outside and work with, checker works with two copies. We keep two copies. One is for the driver, one is for the plan clerk.

Q Well, how many people do receive, ultimately receive, a copy of this delivery receipt?

A Well, four, I would say. We keep a copy in the receiving office, the steamship company gets the original copy, plan gets a copy and the truck driver gets a copy.

Q I see.

Now, sir, I show you a document that has already been marked in evidence as Defendant's Exhibit E and I ask, sir, is that your copy, or ITO's copy, of the delivery receipt?

A This is our copy.

THE MAGISTRATE: That's Exhibit 5?

MR. DALEY: That's Defendant's Exhibit E.

Q Does this dock receipt identify the carrying vessel?

A Yes, sir.

Q What is the name on your dock receipt of the carrying vessel?

A It says Morgenstern, but I believe it's Morgenster.

Q Does your signature appear on this document?

A Not on this one.

Q Does it appear on any of the documents?

A If I signed it out, it should appear on the steamship company's copy and the truckman's copy.

Q Could I have your copy of the receipt?

I show you what has been marked in evidence as Plaintiff's Exhibit No. 4 and I ask if you can identify that document.

A I signed this one out. It's the original of this.

Q It's the original of this.

I also show you Defendant's Exhibit B and ask if you can --

A I'm sorry. This must be the truckman's. I'm looking at the name.

Q Okay.

A This is the truckman's.

THE MAGISTRATE: Which is which now?

THE WITNESS: The one that's blank on the back, sir, is the truckman's copy.

THE MAGISTRATE: And that is Exhibit 4.

MR. DALEY: Plaintiff's Exhibit 4.

THE MAGISTRATE: Plaintiff's 4. That is the truckman's copy?

THE WITNESS: Right, sir.

THE MAGISTRATE: All right.

THE WITNESS: And this here is the steamship company's copy. I signed that one too.

THE MAGISTRATE: And you say this is the original?

THE WITNESS: That's the original.

MR. DALEY: He just said that that is his signature; he didn't say that was the original.

THE MAGISTRATE: He testified that the shipowner gets the original. This doesn't look to be an original to me, it looks to be a carbon copy.

THE WITNESS: Your Honor, may I explain something, so I don't cause too much confusion? The driver comes in, he hands me four copies. I'll say I'm the routing clerk. We take the four copies, number them, put them in the clock. We send him out.

Now, I assume when they come back in I am getting them the same way. It doesn't necessarily mean that. The checker might have pulled them apart to put carbon in and then restapled them, but when it comes back to me, checker writes this way. This is the copy we keep, carbon is here. That's why I call this the original

THE MAGISTRATE: You say original. What you are speaking of is that which has the checker's carbon on the back, you call the original.

THE WITNESS: Right, sir.

THE MAGISTRATE: Because they get the top copy.

THE WITNESS: That's why I call it that.

BY MR. DALEY:

Q Now, Mr. King, when are these dock receipts forwarded to the steamship company?

A At night, when we're all finished.

Q Could you review any of those documents and see if there is any time stamps on any of those documents?

A Yes, sir. March 18, 1974.

Q Is that March 18th or March 13th?

A This is the time it comes in to us.

Q Is that March 18th or March 13th?

A 13th. I'm sorry. I have a little problem.

Q Now, when would you forward the steamship copies of these documents?

A The night of March 13th.

Q And is this the normal procedure?

A It is, unless it's an open receipt where we wouldn't get all the freight on that one day.

Q As far as you know, is this an open receipt?

A No, sir, this was finished. Twelve pieces come in.

Q Now, sir, when you forward a copy to the steamship company -- all right?

A Yes.

Q -- does it have the same name of the vessel and everything else on it?

A That's right.

Q Now, I ask you to compare your file copy of the dock receipt, which is Defendant's Exhibit E, with the copy forwarded supposedly to the steamship company, which is Defendant's Exhibit B, and ask you if you can compare those two exhibits?

A I'll tell you, their copy has got

"Nederburg" stamped, ours still has Morgenster on it.

Q Are there any other notations on there that are not on yours?

A Well, all this writing down there is not on ours.

Q And do you have a 660 on yours?

A No, I don't know what that is, to be honest with you. It could be something the checker wrote on it or someone out on the dock.

Q Okay.

A What it is, unless it was the location on the pier, they go by days, that could have been put down on day 66.

Q Do you keep an exact copy of the dock receipt that is forwarded to the steamship company?

A Yes, this here.

Q And your copy says "Morgenster"?

A Right, sir.

Q And theirs says "Nederburg"?

A Right.

Q Based on those two documents, who changed the designation, if you know, from Morgenster to Nederburg?

A I wouldn't know.

Q Would it be ITO?

A No, if we changed it, we'd stamp all the copies.

Q You would stamp all the copies?

A Right, except maybe the truckman's, if he had gone and somebody called up and told us we want to change the vessel. It's too late to get the truckman's back, but we have the other three copies.

Q So in other words, if you were notified it was changed to the Nederburg, your dock receipt would also read"Nederburg"?

A Right, sir.

Q In March of 1974, was it a customary practice of ITO to send their copy of the dock receipt to the steamship carrier

A No.

Q Why not?

A It's our records. We have to have something in the office.

Q Were there instances when you had trouble getting them back?

A I believe there were, where we lost some.

Q And it's the only record you have of what you received?

A That's right.

Q Are you familiar with the term "split dock receipt"?

A Yes, sir.

Q Could you explain for the court what a split dock receipt is?

A Well, a split receipt would be one where we finish a ship up and there's been a shut-out after the ship has left, they come back and say, "Well, five went on the original vessel, and we have 10 on the dock that are going to go on the next vessel." That is what we call a split receipt.

MR. DALEY: Could I please see Defendant's Exhibit H, I believe it is. No, I'm sorry. F. That's it right there, the yellow papers.

Q I show you the second page of Defendant's Exhibit F and ask you, is that an example of a split dock receipt?

A This is an example of a split dock receipt, sir.

Q Did you examine your files to find out whether or not ITO had a split dock receipt on this shipment?

A I didn't know, sir, but I would assume that we have. Because --

Q On this shipment?

A If we gave it to this, then it wouldn't appear on ours.

Q I am talking about the ship in suit.

A No, I'm talking about this one.

Q Would your file copy then note that it's a split shipment?

A If it was split, yes.

Q So as far as you know, this was not a split shipment?

A No, sir, this was not a split shipment.

Q In the case of a split shipment, would ITO forward another dock receipt to the steamship carrier?

A No, sir.

Q They would not?

A No.

THE MAGISTRATE: How would you let them know about it?

THE WITNESS: Well, either by phone or a list would be made up and sent over. At one time I believe they might have let them look at ours to get this here information, but we don't send any more receipts out of the office.

Q Based upon your records and your dock receipts, is it your opinion that the total -- at the time the Morgenster sailed in March of 1974, is it your opinion that the total lot of cargo was on board that ship?

A As far as we know, yes.

MR. DE ORCHIS: Objection. There is nothing on the dock receipt that shows anything was loaded.

MR. DALEY: This man deals with dock receipts all the time, your Honor.

THE MAGISTRATE: Why don't you phrase the question in terms of what do the dock receipts reflect as to the disposition of the cargo. That, of course, does not indicate any more than what the dock receipts say, rather than what actually occurred.

BY MR. DALEY:

Q Okay. What does your dock receipt,

Defendant's Exhibit E, reflect in relation to this shipment of cargo?

A That we received 12 pieces for the Morgenster going to Durban. Now, as far as we were concerned, they were on the vessel.

Q Now, if a case arose where one -- say, for example, one case went on the Morgenster, and the time they were loading the subsequent vessel they found some more cargo that was supposed to be on the Morgenster, would you issue a split dock receipt?

A If we knew about it in time we would, yes.

Q So it is all a matter of timeliness?

A Right.

Q But you would notify the carrier, anyway?

A Right, sir.

Q I am interested in one other point, Mr. King, if you could.

You stated that you sent a packet of dock receipts at the end of each day, is that correct?

A Right, sir.

Q Are the dock receipts split up?

A In what way, sir?

Q Well, if, as far as you know, everything is going to go on the Morgenster, would the dock receipts just be forwarded in the normal course?

A At night, sir. Maybe I can explain.

We are receiving freight all day long, Morgenster, Nederburg, or whatever vessel. At night, these are all put in an envelope and sent. We do not know what in that pile of receipts is already on that vessel.

Q You do not know?

A Not until the finish of the vessel.

Q Not until the finish of the vessel?

A Right.

THE MAGISTRATE: When you say "sent over," sent over to whom?

THE WITNESS: SAF Marine office.

Q Is there an occasion where on one vessel you would send over one packet for cargo which is supposed to be loaded aboard, cargo which is split, and cargo which is purposely shut out, would you send over separate packets?

A No, sir.

Q They would all be sent together.

A All sent in the same envelope.

MR. DALEY: That is all I have right now.

THE MAGISTRATE: Cross examination.

CROSS EXAMINATION

BY MR. DE ORCHIS:

Q Mr. King, take a look at your copy of the dock receipt.

You say that from looking at that dock receipt you come to the conclusion all 12 packages went forward on the Morgenster, is that correct?

A As far as we knew, yes, sir.

Q But there is nothing on that dock receipt to show that any cargo was loaded on the Morgenster, is that right?

A No, sir.

Q And if I told you that 11 of these packages in fact were delivered by the Nederburg, would you then agree with me that this dock receipt is wrong?

A No, sir. In a way, it could be wrong. This could be a mistake on the part of someone out on the pier.

Q If 11 packages had gone on the Nederburg instead of the Morgenster, would you agree with me that somebody on the pier made a mistake?

A A mistake was made, yes, sir.

Q And if 12 packages had gone on the Morgenster, as shown on that dock receipt --

A Yes, sir.

Q -- would you agree with me that your company ought to have a tally showing 12 packages loaded on the Morgenster?

A If 12 had gone on, and the man had counted the 12, we would have a tally, sir. That man is covering three, maybe four different gangs at one time. It is impossible for him to count every piece going in the vessel. It's one man.

Q You mean there is one tallyman ---

A There's two men on the ship, one takes the forward end, one takes the aft.

Q This ship has five hatches?

A I don't know how many hatches. I don't know how many gangs. You could have five hatches and ten gangs.

Q Assuming five hatches, you are going

to have two tallymen?

A That's right.

Q Trying to keep up with five hatches?

A That's right.

Q Is that to save money?

A I could see where I've had to cover five gangs by myself. These guys are getting a break.

Q Who is getting a break?

A These tallymen that are trying to catch this cargo. I had to cover five and six gangs by myself.

Q That was while working for ITO?

A No, sir, for other companies. ITO has always given, as far as I know, has always given us two men on the ship, and I took stowage for them for about a year.

Q But you say that it is possible that if a ship has five hatches and they are all being worked, that you have only two tallymen trying to keep up with this tallying?

A Right.

Q Would that sometimes lead to mistakes in tallying?

MR. DALEY: Objection, your Honor. This man doesn't prepare tallies.

MR. DE ORCHIS: I will withdraw the question.

Q Mr. King, we are going back now to March of '74.

A Yes.

Q Is your memory about the practices that were going on in March of '74 really that clear?

A It's two years ago, sir. But we still operate more or less the same way.

Q In March of '74, when the ship was finished and had sailed, did you send your copies of the dock receipt to the company?

A We send our copies over every night, sir.

Q Every night?

A Every night.

Q Your copy of the dock receipt?

A Their copies. We keep our copies.

Q I am not talking about their copies.

A Our copies do not go over, sir.

Q In '74, you say you did not send your

copies of the dock receipt?

A I say there may have been cases where they were sent over by the head clerk. In a case like this, of a shutout, split receipts were sent over.

Q So if a shipment were shut out, the dock receipt would be sent over to the company?

A At one time they sent them over, because there was so much volume of a shutout it would be impossible to handle it over the telephone.

Q All right.

Do you remember that a time came when you stopped this practice of sending the dock receipts over to the company?

A Yes,sir.

Q And started to send a list instead?

A That's right.

Q And do you remember that that practice began with the ship called the Weltereden in April of '74?

A I don't recall just when it started, sir. It started because we lost some receipts.

Q Exactly. It started right after this shipment, didn't it? Right after the Nederburg?

MR. DALEY: Objection. He says he didn't know.

THE MAGISTRATE: Let him look at the document. Mark it for identification.

(Sheet headed "Vessel and Port," marked Defendant's Exhibit J for identification.)

Q Mr. King, is that an ITO form?

A This is a form we make up in the office, sir, to keep a track of our tonnage.

Q Does that form show what is shut out from a shipment?

A This shows what was shut out of the Weltereden for the port of Durban.

Q And what is the date of that document?

A I don't believe there is a date on it, sir. He's got March.

I'm sorry. There's no date on here, sir.

Q All right. Do you remember when the Weltereden sailed?

A No, sir. She sailed so many times, I wouldn't remember her dates.

Q Is this document issued in the regular course of your business?

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MR. DALEY: If you know.

A We do not issue this document to anyone, sir. This is for our office records, to keep our tonnage reports.

Q Is it a document you prepare in the regular course of business?

MR. DALEY: I am going to object. There is no foundation that this witness prepared this document.

THE COURT: If he knows, he can answer it. If he doesn't know, he can't answer it.

A Sir, we make up a couple of hundred of these. When we start a ship, we put the vessel name here, the port here. We have one sheet for each port.

Q And you do that --

A We enter receipts as they come in by numerical order, and at the end of the night we total them up to find out how much freight and how much cubic feet we got for the day.

THE MAGISTRATE: The question he is asking you is, do you do this regularly in the course of your business?

THE WITNESS: Yes, sir.

Q Now, if at the time that the Nederburg sailed this form was being used, your company would have a copy of it, wouldn't they?

A This here?

Q Yes.

A Yes, sir.

MR. DE ORCHIS: May I call for the copy, if you have it.

MR. DALEY: I don't have it.

A Excuse me. Not necessarily would we have a copy of this. This is prepared by the head clerk or it could have been prepared by me. I didn't prepare this one, but I might have at another time. We don't necessarily make up a copy of this for ourselves, because what we do, when we are starting a new ship we run these dock receipts out and show them as being from the Welteredeen, and then we continue on from there against the next vessel, so we are not necessarily going to have a copy of this. I doubt very much that we do.

Q If there was cargo shut out from the Morgenster, would you have put it on this list?

A If the Morgenster is involved in the

Weltereden, but if it is I would put it on this list.

Q I am not saying on this particular piece of paper.

A Yes, it would be on there.

Q There would be one for the Morgenster similar to this. Now, that is the document I am calling for.

A No, you say this started after the Morgenster sailed. We didn't always do this. As I said to you before, sir, not to interrupt, we used to call in with the dock receipt numbers what was left on the pier.

Q Sometimes you called in?

A And then it got to the point where they sent the receipts over.

Q All right. And then later on came the point where you started to make these lists?

A Right.

Q Now, my question to you was that you testified under oath that you knew that as of the time of this case, of the Morgenster, that as of that time, you were sending over lists.

MR. DALEY: Objection. He said he

was doing it orally.

Q You didn't remember?

A I didn't remember. I said we may have sent the receipts.

Q That's all I want, is your agreement that you don't remember.

A I said that.

Q Thank you.

A This is two years ago.

MR. DE ORCHIS: All right.

THE MAGISTRATE: Cross examination by the plaintiff.

CROSS EXAMINATION

BY MR. KOCHENDORFER:

Q You mentioned earlier that you had four copies of the dock receipt. Do you know where the fourth copy is?

A That would go to the plan clerk, sir, and when he is all done after a while, they get thrown away. There is nothing on them outside what's on the face.

Q What does the plan clerk do with his copy?

A When the stowage man comes in and gives him stowage, we'll say on this dock receipt four going in a certain hatch, in a certain location, he takes it and he applies it against the vessel.

Now, at the end of a period of time, he will take so many pieces of cargo in this area, and from the weight he gets a tonnage what was put in this part of the vessel.

Q But does he use the dock receipt with a particular ship name to match it up with a plan, a stowage plan, for a particular vessel?

A No, he gets one with the ship name on it.

Q Does he match the dock receipt with a particular vessel name with a stowage plan for a particular vessel name?

A I believe I don't understand.

Q Does the plan clerk deal with the stowage plan?

A That's right.

Q And does the stowage plan have the name of the vessel on it?

A Yes.

Q Does he utilize that dock receipt, does he look and see Morgenster, does he then get the plan for the Morgenster and match up the two and see that the space is available on the Morgenster?

A He has the plan laid out in front of him from the start of the vessel. And he is working with these receipts right from the start of the vessel.

Q Does he transfer any information from the dock receipt onto the stowage plan?

A Just the amount of pieces, sir, and the weight, and -- the amount of pieces and the weight. That's all he's interested in. The port, the amount of pieces and the weight.

THE MAGISTRATE: As I gather it, he is interested solely in distributing total cargo weight?

THE WITNESS: That's it.

THE MAGISTRATE: Evenly throughout the hatches, depending upon port of delivery?

THE WITNESS: That's right. It's very simple.

Q And is there any place on the dock receipt where there is a notation as to the location on the pier?

A On the front of the receipt, generally it will be like that, or the one with the 66 could possibly be a location.

I haven't been outside in about three and a half years or so. Not too sure how they are marking them up right now.

Q Do you have a location man on the pier?

A Yes, sir.

Q And does he get a copy of the dock receipt?

A No, sir.

Q How does he know where the cargo is for?

A That's not his job, sir. His job is to lay out bays for certain ports and various vessels.

Q But if he doesn't know what is coming, how can he lay it out?

A You just have to gamble on your own.

MR. KOCHENDORFER: Thank you.

THE WITNESS: You could be receiving from four different vessels so you have to lay out the bays accordingly.

THE MAGISTRATE: Redirect?

MR. DALEY: I have no further questions,

your Honor.

THE MAGISTRATE: You are excused.

THE WITNESS: Thank you, sir.

(Witness excused.)

MR. DE ORCHIS: I offer Defendant's Exhibit J, which has been marked for identification, in evidence merely as a form used by the terminal operator to indicate shutout cargo.

MR. DALEY: I am going to object to that, your Honor. There has been no testimony to establish when that form came into being whether in fact it was used on these vessels, there has been no foundation laid.

Mr. DeOrchis, if he wants to properly have it identified, let him subpoena a witness.

MR. DE ORCHIS: I believe it has been properly identified.

THE MAGISTRATE: Identified but not as to date of preparation.

MR. DE ORCHIS: I have a witness for that.

THE MAGISTRATE: All right, then hold the exhibit.

MR. DE ORCHIS: Thank you.

ANGELO ROBERT SANTISI, called as a witness by third-party defendant, being first duly sworn and stating his residence as 248 President Street, Brooklyn, New York, testified as follows:

DIRECT EXAMINATION

BY MR. DALEY:

Q Mr. Santisi, where are you presently employed?

A At the Army Base in Brooklyn, 58th Street, by ITO.

Q By ITO. Okay. How long have you been employed by ITO?

A About 11 years.

Q Were you employed by ITO in March of 1974?

A Yes.

THE MAGISTRATE: Counselor, can we stipulate, so the record doesn't get confused, that the 60th Street pier is at the Army Base?

MR. DALEY: Yes, it is.

THE MAGISTRATE: Because the last witness identified it by the street pier, rather than at the Army Base. Does everyone agree that it is one and the same?

MR. KOCHENDORFER: Yes, sir.

MR. DE ORCHIS: Yes, sir.

MR. DALEY: Yes, sir.

BY MR. DALEY:

Q Okay. What were your duties in March of 1974?

A Well, I am a checker and also used as a stowage checker.

Q What is a stowage checker? What are his duties?

A Mark all these dock receipt numbers that go into the ship.

Q That go into the ship. Where are you located when you mark these?

A Right on the pier in front of the ship.

Q Right on the pier in front of the ship. And how do you get the dock receipt number and the other information?

A We have hi-lo drivers going into the base. They pick up the drafts of cargo, take it over by the hatch, and I in turn would go over to the drafts and take the dock receipt numbers.

Q Where would you get that from? Is there a label on there?

A Yes, we have a label on the cases.

Q What does the label state?

A It shows you the port on it, and then checkers write in the dock receipt number, the ship and the bay that it's going into.

Q Now, sir, Third-Party Defendant Exhibit H, which has already been admitted into evidence, I ask you to look at the first page of that document.

A This is my handwriting.

Q Is this your hatch tally check?

A That's right.

Q And what vessel is that hatch tally check for?

A Morgenster, No. 6 hatch.

Q And what was that tally check for?

A 3/15/74.

Q Is there anything on that hatch tally check which relates to dock receipt No. 207?

A Yes. I have dock receipt 207 on 12.

Q Is that on 12 or /12?

A Well, it means 12 pieces of that dock receipt number.

Q And how many pieces do you show on that dock receipt?

A One.

Q And you performed this tally yourself?

A Right.

Q Based upon this document, did that one piece go on the Morgenster?

A Yes.

Q You have no question in your mind that that went aboard the Morgenster?

A No, sir.

Q If it did not go aboard the Morgenster and was left on the dock, how would you find out if it didn't go on?

A Well, the hi-lo drivers would notify me that they are not taking this cargo in. I'll tell you, they take the cargo from the bays, they will never bring it back out again; they will leave it right where it is. But as a rule, when the cargo goes by the hatch, it goes into the ship.

Q Now, if a hi-lo driver did take it away from the side of the ship, would he notify you?

A Yes?

Q Do you also conduct a pier check after the vessel sails?

A Not me, but the location man does that.

Q And if there's something remaining on the pier, would he notify you?

A No, he notifies the office.

Q Now, if there was a correction on your tally, who would correct it?

A I would.

Q In other words, if you were notified that something did not go aboard the vessel, you would cross it out?

A Right.

MR. DALEY: I have no further questions.

THE MAGISTRATE: Cross examination.

MR. DALEY: I am sorry, your Honor. He identified this exhibit. I would like to have it -- it's already in evidence, but I think I would specifically like to take it off this one since it is just this witness that's testifying to it.

THE MAGISTRATE: I thought it was all

in evidence.

MR. DALEY: Okay, fine, it's all in evidence. Thank you.

CROSS EXAMINATION

BY MR. DE OPCHIS:

Q Mr. Santisi, you are testifying now from your memory of what happened in March of 1974?

A Not my memory, from what I put on that paper.

Q You recognize the writing on the paper as yours?

A Right.

Q In a ship like the Morgenster, how many tally clerks would you have assigned to that ship?

A There's two of us.

Q How many hatches did that ship have?

A Five.

Q Would the two tallymen be watching the cargo as it was loaded into these five hatches?

A More or less, yes.

Q Is it possible there might be as many as ten gangs on that ship?

A No.

Q Five gangs?

A Could be five, could be six. Sometimes seven.

Q I show you the exhibit that you were looking at. What hatch was this cargo put in?

A No. 6.

Q How many hatches does the Morgenster have?

A I don't remember.

Q It's five, isn't it?

A Well, there's some with five, some with six hatches. I don't remember offhand two years ago.

Q You just said it was five hatches.

A I understand that. Some ships have six hatches. I just said five, because as a rule most of the ships have five hatches.

Q Look at those dock receipts, Mr. Santisi.

A Yes, I am looking at them.

Q The top one is yours?

A Right.

Q Now look at the second one. Is it signed by a tallyman?

A Yes.

Q Look at the third one.

A I have that habit. I don't sign them.

Q The fourthone, is it signed by a tallyman?

A Yes, that's the stowageman.

Q Was yours signed?

A No. As a rule I don't usually sign mine because -- I don't know why; I don't sign them.

Q Aren't the tallymen supposed to sign their tallies?

A Well, this is not what you would call a tally that has to be signed like a dock receipt. In other words, if I receive cargo from truck, then I sign it; but, more or less, on these here I usually don't sign them.

Q What's the purpose of making up a document you don't sign?

A There's no purpose, I mean.

Q Mr. Santisi --

A This is going to a plan clerk, sir.

Q Isn't it the practice in New York harborthat when the clerk, a tallyman, is satisfied that cargo has been loaded, he signs his signature as proof that it has been loaded. Isn't that the practice in New York harbor?

A Yes, sir, it is.

MR. DE ORCHIS: Thank you.

THE MAGISTRATE: Cross examination by plaintiff?

MR. KOCHENDORFER: I have no questions.

THE MAGISTRATE: Mr. Santisi, many years ago, maybe almost 30, I worked as a checker on the piers in New York, and at that time we employed one checker per hatch being worked, and the checker checked cargo by standing next to the hatch coaming and counting the cargo as it actually went aboard. From your description you make your check on the pier as the cargo was removed from the bay and put on the stringpiece.

THE WITNESS: Right.

THE MAGISTRATE: How long is that a common practice now in the Port of New York?

THE WITNESS: Yes, it is.

THE MAGISTRATE: For how long has that been the common way of checking cargo aboard.?

THE WITNESS: I would say a good

25 years that I know of, that they take cargo from the bays and put them on the piers by the hatches.

THE MAGISTRATE: I guess as a checker I go back further than you do.

I would also say it's rather apparent that having a checker per hatch you are going to have greater accuracy than having two men covering five hatches. You agree to that?

THE WITNESS: Yes, sir.

THE MAGISTRATE: And particularly since by having a checker per hatch he can observe the cargo as it is taken in by the hook rather than as it is moved to the stringpiece by the hi-los?

THE WITNESS: Right.

THE MAGISTRATE: Because, as you described it, there is always the possibility of cargo being taken out by a hi-lo from the bay and then never actually hoisted aboard, but when that happens they are supposed to tell you, although they took it out of the bay they had to return it?

THE WITNESS: Right. Well, your Honor, on our pier, on our pier they never put it back; they always leave it. They leave it sitting out there. I mean, like usually they wouldn't take this cargo away from the hatch and put it back into the bay.

THE MAGISTRATE: What would they do with it?

THE WITNESS: They would notify us, and maybe another gang would take it and put it in another hatch; but as a rule it usually goes all the time -- it goes into the same hatch.

THE MAGISTRATE: Extremely unusual for cargo to be moved out of the bay and not loaded?

THE WITNESS: Right.

THE MAGISTRATE: On this document, which is Exhibit H, Third-Party's H, next to this entry for dock receipt 207 there is a word written that seems to be "Parts."

THE WITNESS: That --

THE MAGISTRATE: Did you write that?

THE WITNESS: No, this is after we are finished with this, I give this in to the plan clerk. The plan clerk takes the dock receipt number, he takes the rate and he marks commodity on the tally.

THE MAGISTRATE: This is not your

handwriting, the word "parts"?

THE WITNESS: No.

THE MAGISTRATE: So you don't know if in fact that box contained parts or something else?

THE WITNESS: I wouldn't know.

THE MAGISTRATE: Who put this red mark here in ink, do you know?

THE WITNESS: I have no idea.

THE MAGISTRATE: All you did was indicate that one piece from dock receipt 207 out of of the 12 total pieces was moved out of the bay for loading into --

THE WITNESS: No.6 hatch.

THE MAGISTRATE: Where does it say No. 6?

I see. I'm sorry. No. 6 hatch. The upper tween deck, forward wings and square.

Any further questions, gentlemen?

MR. DALEY: Yes, I have a few, your Honor.

REDIRECT EXAMINATION

BY MR. DALEY:

Q Is this document or the document that

you said is in your handwriting, this document, more properly identified as a dock receipt or tally?

A A tally.

Q It is a tally?

A Right, it's a tally of the cargo going into the hatches.

Q Do you know how many hatches were working on March 15, 1974?

A I have no idea.

Q Is it possible that only one hatch was workin on March 15, 1974?

A Possible. I have no idea.

Q And it is also possible that you were the only hatch checker employed on that date for hatch No. 6?

A It could be possible. We have had maybe one or two gangs working and I would be only taking care of one gang.

Q And it is your testimony here today -- well, when did you prepare this document? Was it on the 15th?

A On the 15th. The day that I put the date on, that's the date I put the cargo into the ship.

Q That is the date you put the cargo into the ship?

A Yes.

Q Thank you.

No further questions.

THE MAGISTRATE: You are excused, Mr. Santisi.

(Witness excused.)

THE MAGISTRATE: Next witness.

RICHARD J. RIES, called as a witness by third-party defendant, being first duly sworn and stating his residence as 7922 11th Avenue, Brooklyn, testified as follows:

DIRECT EXAMINATION

BY MR. DALEY.

Q Mr. Ries, where are you presently employed?

A Army Base, 60th Street pier.

Q By whom?

A ITO.

Q And how long have you been in the employ of ITO?

A About four years.

Q Were you in the employ of ITO in March of 1974?

A Yes.

Q Was it at the same pier?

A Yes.

Q What were your duties in March of 1974?

A I was a location man.

Q And what are the duties of a location man?

A To lay out the pier and keep the hatch doors open for the ships, release cargo.

Q You actually position cargo inside a shed or something else like that?

A That's what I mean by laying out the pier. When you lay out a pier you lay out the doors for the cargo.

Q Are you familiar with the shed set-up at the 6 60th Street pier?

A Yes.

Q Could you basically tell us how the shed is set up?

A The feet, I don't know how many feet.

Q I don't mean in feet. Is it set up by vessel or by port? Or how is it set up?

A Well, on the south inner berth we put

the ships. And on the north side of the pier we put mostly the cargo from the beginning of the pier down to the end. And we also go on the south outer, where the new vessel comes in. Depends upon how much cargo you have and how many ships you're laying out for.

Q Is it set up by ship or by port or, you know, specifically --

A Ship and port. You can receive for two and three ships.

Q Okay. So it's laid out by ship and port?

A Right.

Q Were you location man during March of 1974 when the Morgenster and the Nederburg loaded at the Army Base pier?

A Yes, sir.

Q Sir, I show you a document and ask if you can identify that document.

A These are my papers.

Q These are your papers?

A Yes.

Q And what are they?

THE MAGISTRATE: I think you should

mark that for identification.

MR. DALEY: Mark it for identification, your Honor.

(Document consisting of seven pages, headed "Morgenster" and dated 3/14/74, marked Third-Party Defendant Exhibit I for identification.)

xx MR. DE ORCHIS: No objection, your Honor.

Are you offering it in evidence?

MR. DALEY: Yes, I am.

THE MAGISTRATE: I take it this is the shed layout as of March, 1974.

MR. DALEY: No, this specifically refers to the Morgenster. It's various documents that just refer to the Morgenster.

THE MAGISTRATE: Morgenster alone?

MR. DALEY: That's right.

MR. KOCHENDORFER: I have no objection.

THE MAGISTRATE: Mark it in evidence.

(Third-Party Defendant Exhibit I was received in evidence.)

xx BY MR. DALEY:

Q Mr. Ries, you identified these as your documents?

A Right.

Q Could you please tell us what the first page of Third-Party Defendant Exhibit I is?

A The first page here is the layout of all the cargo laid out in bays. In other words, you go by the ports and the bays we put the ports in.

Q Could you tell us what the second page of Third-Party Defendant Exhibit I is?

A This is from Safmarine, telling us what cargoes to hold, to hold on dock, because the ship was tight, they couldn't fit this cargo in, so they give us what we could find.

Q Is the third page the same?

A This is the same.

Q Now, if you could just hold it right there. Pages 2 and 3, pages 2 and 3 of your documentation, is there any notation there regarding dock receipt No. 207?

A No.

Q Now, where do you get these instructions to hold dock? Who gives them to you?

A Well, it depends. Now, either Captain Palmer could issue them to you, make a list up, or there would be someone from the freight department, Safmarine's freight department, that's who we deal with. And, as I say, it could be one of the men they send down.

Q Okay. Now, with relation to pages 2 and 3 --

A That's these two.

Q -- these are your instructions to hold?

A We try and grab this cargo. This cargo is received already on the pier. Now, they decided there is not enough room in the ship, they have got to try and make a hold. They give us a list that they pick out by cube, the largest cube, keep the lot together, and we will put it on the following vessel, and this is how they do it. And I go out with a hi-lo driver, pull these out, most of them, put them into a location, and they shut out a ship.

Q Are all the hold dock receipts -- are they all put in the same location?

A No, they vary. See, I have it marked on the side where I pulled them out and put them on the side so they wouldn't get loaded, then I put a temporary hold label on them and they don't take them.

Q There is a label you placed on these shipments that are held?

A Yes, it's a pepper-striped temp. hold.

Q Could you please go to the fourth page of the exhibit? Is that the same as the first page?

A This is similar.

Q Now, what is the last page?

A This here is cargo that's being released by Safmarine. They call up the head delivery clerk and over the phone they will give him the hold-on-dock number. This cargo was received on the pier and it is being held for a reason; maybe money, maybe the documentation is not in order. Then they release the cargo. These are the releases we did for the Morgenster. We put this cargo on.

Q Was that cargo originally supposed to go on the Morgenster?

A Yes.

Q It was.

A But I didn't do the releasing because we were busy and I had a man help me and this is his writing, this is not mine, the man that released. This is hold-on-dock cargo. That's received hold-on-dock.

Q Okay.

A It's not received for any vessel. It could stay there for a month or two months.

Q So there might not be a designation of vessel yet, is that correct?

A That's correct. In other words, this was just received and they are holding it maybe for a consolidated shipment. That's what this is.

Q So who finally decides whether or not this is supposed to go aboard a specific vessel?

A This?

Q The released cargo.

A The freight department, Safmarine's freight department.

THE MAGISTRATE: May I see that document, please?

Q Sir, in any part of that exhibit do you find any notation regarding dock receipt No. 207?

A No.

Q Based upon your experience as a location man, and based upon your own documentation as to what was supposed to be shut out, what happened to this cargo that was originally supposed to go on the Morgenster?

A In reference to dock receipt 207? Well, the following ship coming in was the Nederburg, and when we were taking the Durban Nederburg cargo out we come upon some drafts of Morgenster cargo dock receipt 207. Now, when we did that the first thing we do, we put it on the side and we go to the office and we call up the freight department, Matty Percia or Bob Johnson or Dick O'Leary, and we notify them of the cargo on the pier and what has happened. And then we put it onto the Nederburg.

Q Now, do you make a count of the cargo that you find?

A Yes. We get a rough idea of the count, how many pieces, I tell them I find so many pieces of this. I have done this in the past. These are our orders.

Q Now, supposing the label on the pallet says "Dock receipt 207/12" and you only find 11 pieces. Do you go to the planning clerk to find out what happened to the other pieces?

A We go to the plan clerk, we can ask him, he will pull out his tally and say, "Yeah, I put one on the Morgenster. There's 11 here and we got to put them here."

Q Is that what was done in this case?

A Hard to remember exactly but I know for a fact that we do notify the freight department. You're going back two years. It's hard to remember the exact moment.

Q But you did notify the freight department whatever was remaining on the dock?

A Well, we have orders from ITO, from the superintendent, that if we find anything, that we must notify the Safmarine's freight department of what we find, so they can get their documentation in order, because their vessels don't go to the same berths in Africa, they can go to different sheds.

Q They can go to different sheds?

A Yes.

Q Now I show you page 2 of Exhibit No. -- if I can just see it; I don't remember what the number is -- page 2 of Exhibit No. H. Now, that has already been introduced into evidence as a hatch tally for the S.A. Nederburg on March 22, 1974, okay, and it has already been identified and testified that there are some pieces in there identified under dock receipt No 207. Does that give any indication to you as to when you found this shipment?

A Not exactl[illegible] I mean, I could have found it on the 22nd or the 21st.

Q But it would be either on the 22nd or before that?

A Yes.

Q I mean would you load cargo that has a dock receipt for another ship without notifying somebody?

A No. Otherwise, what if the man don't want the cargo to go? He may want to take it out and put it on another vessel, another line.

Q Now, when the Morgenster sailed, when she sailed from New York, in March of '74, on the date of sailing, wheredid you think this cargo was?

MR. DE ORCHIS: Objection, your Honor.

THE MAGISTRATE: Sustained.

A This cargo after the Morgenster --

THE MAGISTRATE: Don't answer it.

THE WITNESS: I wouldn't know myself.

MR. DALEY: That's all I have for

right now.

THE MAGISTRATE: Cross examination.

CROSS EXAMINATION

BY MR. DE ORCHIS:

Q Mr. Ries?

A Yes.

Q In the first column of the tally, would you tell us what those figures indicate in the first column?

A This here is the dock receipt numbers and the amounts that are against the dock receipts.

Q And in the second column, the numbers in circles, what do those indicate?

A That indicates how many pieces the man received by his hatch.

Q The number of pieces the man received by the hatch?

A Right.

Q And in the third column, those tallies, what do they indicate?

A This is -- otherwise he only got two. See, now, normally if your work calls for 12 you write over here two is what you received. Now, see here, he gave a stroke tally for 4, if you will.

Then he writes his main amount of 4. Was on 4, 3, 35, on 4 maybe he received 1000, one later, another one, he strokes. Then he puts his full amount in here of what he gets.

Q Of what he gets. So the strokes would equal the full amount?

A It did. Like this one here does.

Q And that is true. The one up above the same thing?

A Like the 7th.

Q The stroke agrees with the number in the circle?

A Now, this is what he got on here is two.

Q May I please have that a second?

A Sure.

Q I call your attention to the tally which is dated March 24, 1975. You see the number in the circle says how many?

A Here?

Q Yes.

A Three.

Q There were three packages?

A And over here, sir, he wrote three down is what he got.

Q And that 4 in a circle in red ink, who wrote that?

A I don't know who wrote that.

Q And does that mean anything to you, that 4 in a the circle?

A You got 12, 3, you got 4. The man who wrote it could have put down -- it could be the stowage plan. Maybe he was going along with his thing, he has a dock receipt when he writes the amounts down. Now he could put four already loaded. I don't know.

Q All right. You just finished telling us that in the first column the 3 in the circle is a number the man receives at shipside?

A No. I told you over here, sir, is what the man wrote down. **There's** a 12 right here. The man received 10, he shows 10.

Q I am talking about the one that refers to this ship.

A Yes.

Q All right. In the column here, how many?

A Three.

Q And how many did he load?

A Three.

Q And this 4 in red ink is nothing, it's to be disregarded, isn't it?

MR. DALEY: Your Honor, 11 were loaded on.

THE MAGISTRATE: Gentlemen, everyone can't talk at once.

Q Do you know if that 4 in red ink was there at the time that this tally was made on the date shown at the top of the tally?

A I don't know who wrote the red ink, and I am not even going to commit myself to say who wrote it, I have no idea.

Now, these -- may I have the exhibit, your Honor?

Q When cargo arrives on a pier and it's to be shut out -- I mean -- I'm sorry -- is to be made hold-on-dock cargo?

A Which way are you receiving that cargo of goods for the ship? You're going to make it hold or is it received hold?

Q Let's talk about hold-on-dock cargo for a minute. It is entirely possible, is it not, that a cargo, even the day it arrives, is already marked hold on dock from the day it arrives on the pier?

A Yes, it has no ship designated.

Q And it's also possible that a day or two after a cargo arrives on the pier somebody decides to hold that cargo for some reason or the other?

A Excuse me. If you receive cargo hold-on-dock on the pier, there is no vessel assigned to it. There are five doors that cargo goes into until the New York office sends a release down, which is that form you have there.

Q And that is what the yellow sheets are?

A That's what the release is.

Q Of hold-on-dock cargo?

A That comes in, no vessel.

Q So there is no reason why the shipment in this case which is received on a dock receipt which says the Morgenster -- there is no reason why it would ever appear on this yellow sheet, is there?

A No, sir.

Q All right. Now we get to these.

These are hold-on-dock cargo for the Morgenster, is that what you testify?

A That is cargo. I testified that that came from the Safmarine's office. If you look at that, you see a big cube on that cargo.

Q A big --

A Now, the ship is tight and they have to shut out cargo. And they try and pick out big lots, complete lots, and that's how we shut the cargo out.

Q So this is a message from Safmarine to you people on the pier?

A To try and grab this cargo.

Q Saying don't load this, there is not going to be room for it, is that correct?

A That's correct.

Q And are there any dates on these documents?

A Well, all them documents pertain to one ship, sir; I don't know if there's a date on them. Safmarine put a date on it, I doubt it.

Q There is no way of knowing then when Safmarin gave you this document?

A When the ship is working.

Q I am saying, since there is no date on here you can't tell me the specific date that this document was given to you?

A No.

Q The ship worked after the 13th of March, didn't it?

A I don't know exactly.

Q Well, let's you assume for a minute the ship worked the 13th, the 14th, the 15th and the 16th. Is it possible that this list would have come to you even before the shipment in suit was received, sir?

A This was received on the 13th?

A Well, this list came after that. This list comes when a ship is working when they decide there is not enough room.

Q All right.

A Otherwise the vessel starts to work and they have too much cargo, there are so many cubic feet left in the vessel, now they are receiving more cargo than what the ship can handle. Now, what they try to do is shut out complete lots for the next vessel. Now , that cargo will go in the Nederburg before the Nederburg cargo will go in.

Q These shipments are all big cubes, aren't they?

A That's what I'm telling you, skidded, mostly skidded.

Q The shipment in suit was a relatively small shipment, 381?

A Well, compared to 1200, yes.

Q So do you make anything at all out of the fact that this shipment is not on your first three sheets on here?

A Well, as I say to you, sir, Safmarine gave me them sheets to try and get the cargo to hold. And they have permission from the shipping people themselves to hold this lot up.

Q These are instructions are from Safmarine to hold this cargo but as you load ship, is it possible that other cargo at the end might still not fit other than these?

A Yes.

Q So then it is possible that after you received these sheets and by the time you finished filling the ship, that there was still some other cargo that didn't fit?

A Correct.

Q And that could have been the cargo in suit, it's possible?

A It's possible. Anything is possible.

MR. DE ORCHIS: I have no further questions.

CROSS EXAMINATION

BY MR. KOCHENDORFER:

Q As a location man, do you prepare a location document, such as you showed here for the Morgenster, for every vessel?

A Well, this here, sir, if you look at that top sheet, is the layout sheet of the Morgenster of all the cargo where it is laid out in the bays.

Q Do you prepare one of these for every ship that comes in?

A Yes.

Q Would it be the same for every ship?

A Yes.

Q In other words, the Durban cargo would use the same bays?

A No, no, we alternate. They would never use the same bays. Sometimes you may; sometimes

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you may not. Depends upon how much congestion.

You have now, if you break open a door, if you take Port Elizabeth out a door, and if you have skids for Durban for the next vessel and that door is free, I'll use it.

Q Now, do you go around yourself on the pier and check the bays to find out whether they are available before you put cargo in for the next ship?

A Yes, sir.

Q And in the instance of the Morgenster, as she was completing loading were you receiving cargo for the Nederburg?

A I believe so.

Q Would you go around the pier then and look to see if there was a bay open to put the Nederburg in or had you made your sheet up by then?

A Well, it depends. It's very hard to answer for two years ago, but as I say, if I had a bay open I will put the Nederburg into it.

Now, if you look at that sheet and look at them doors, we were congested on that pier because you are running from 31 up to 100-something on the bays.

Q Do you instruct the hi-lo operators to take cargo out of a specific bay for the vessel?

A Well, if the port captain wants a certain lot to go forward, I will go down and see the foreman of the ship who will tell a certain gang that this cargo must go and I will go over to that bay with that gang and show them the cargo that has to go.

Q But who makes the determination: we are now loading this ship, we need some Durban cargo for this ship, where do we find it? Who makes the determination?

A Right there on that sheet.

Q But a hi-lo driver, how does he knoww where to go?

A They have what we call a header and he -- he's the head of the gang, he goes out and picks the cargo out. They want skids, the foreman will say, "I want skids" or "I want light cartons." Depend: upon where they're working on the ship. He looks at that sheet and if you look at that sheet you see the doors with the bays in them, and then he will go to these bays and pick the cargo out he wants.

Q And when the ship has completed loading, is ready to sail, do you walk down the pier and check the sheet here with the bays here to make sure all the cargo for that ship is out?

A Yes, except for what we shut out.

Q And what would you do if there was cargo still sitting there for that ship?

A Then if they couldn't fit it in there complete lots, we turn them in to New York.

Q Do you have a sheet such as this for the Nederburg with you?

MR. KOCHENDORFER: I ask counsel, do you have one of these for the Nederburg?

MR. DALEY: Discovery has been completed. All these opportunities were afforded a long time before today's date.

THE MAGISTRATE: Do you happen to have with you the Nederburg --

MR. DALEY: Yes, I do.

THE MAGISTRATE: While he is looking at that, I want to ask a question about this that I don't understand. I understand what the sheets are after the first page, the hold and the release. What I don't understand is this first page.

As you described it originally, it should list all dock receipts --

THE WITNESS: No.

THE MAGISTRATE: -- for the Morgenster. It is not all dock receipts?

THE WITNESS: It's the bays. The cargo is received. 3133 we put K down.

THE MAGISTRATE: These are bay numbers?

THE WITNESS: They are poles. A pole here, a pole here. Gives you a bay.

THE MAGISTRATE: But on the next couple of pages you are dealing with dock receipt numbers?

THE WITNESS: We're dealing with Safmarine on the next couple of pages.

THE MAGISTRATE: So you can't tell from the first page where dock receipt 207 was put?

THE WITNESS: No.

THE MAGISTRATE: But if it was intended for Durban, it should be in one of these bays listed next to Durban?

THE WITNESS: Right.

THE MAGISTRATE: All right. I understand now.

BY MR. KOCHENDORFER:

Q Could I show you Defendant's Exhibit B for identification, which is identified earlier as a copy, one of the copies of the dock receipt, and ask you to look on there as a location man. Do you see any place on that dock receipt the location of that cargo?

THE MAGISTRATE: Let me correct the record, that's not for identification, it's in evidence.

MR. DALEY: Your Honor, I believe it was admitted into evidence specifically limited to the typed portions without any changes. I believe that the admission into evidence was specifically on that ground alone.

THE MAGISTRATE: That was certainly so originally. Whether or not there ever was an offer of the written portions, I don't recall.

MR. DALEY: There has not been to my knowledge, your Honor.

THE MAGISTRATE: How about the writing on the back by the checker? Was that ever offered?

MR. DALEY: I believe there was no contention as to the back of the dock receipt, your Honor.

MR. DE ORCHIS: You mean there is no issue.

THE MAGISTRATE: So all you are contesting arethe handwritten portions on the front about which there has been a lot of testimony but you say it hasn't been offered in evidence.

No, what is the question?

Q The question is, as a location man could he determine from looking at that dock receipt where the cargo was loaded or where the cargo was stored on the pier?

A Yeah, on the back.

Q And where was it?

A 84, 86.

Q And could you look at your location sheets for the Morgenster and the Nederburg and tell me if that location was used for both vessels?

A Yeah, right here. On this one here we start with 80 to 88. Now on the Morgenster --

THE MAGISTRATE: That is the Nederburg you are looking at?

THE WITNESS: This is the Morgenster. This here matches up with this.

THE MAGISTRATE: I understand.

A Now, on the Nederburg, which is a week later, now meanwhile these bays have either been moved or cleaned out completely. Now, we went from Durban, we went from 76 to 84.

THE MAGISTRATE: To clarify the record, what he is saying is that for both vessels, bays 80 through 88 -- excuse me, 80 through 87, which is to say 84 and 86, were used for Durban cargo.

Q Would any of the cargo for the Nederburg be stowed in bays 84/86?

A 84/86? No. Stops at 84, the Nederburg right here. 86/84. In other words, you have an elevator at 84.

THE MAGISTRATE: Hold it a minute.

THE WITNESS: You have half a door.

THE MAGISTRATE: You've got me confused, Mr. Ries. This business of slashing between two numbers, what does 84/86 mean?

THE WITNESS: This is post, this here.

THE MAGISTRATE: Yes.

THE WITNESS: That's the location, 84 to 86. Now, you have a pole numbered 84.

The next number is 86, there's a door there. The doors are not numbered, the poles are.

THE MAGISTRATE: I see.

THE WITNESS: So that's a bay like 84 to 86.

THE MAGISTRATE: So when it says for the Nederburg, 76/84, that means between those two poles, and then when it says 85/87, that means between those poles; and it doesn't mean -- apparently the poles don't go in consecutive number, they go odds and evens?

THE WITNESS: One side of the pier is even, the other side is odd.

THE MAGISTRATE: All right, good. So I withdraw my previous statement that the 84/86 was used for both vessels for Durban cargo. It would appear from the Nederburg that 84/86 is not listed for any port, for any cargo. Is that correct?

THE WITNESS: No. It's not listed.

Let me see. It's not listed.

Q So then according to what you state, if cargo was sitting in bay 84/86 when the Morgenster --

completed loading --

A Right.

Q -- it would be in full sight?

A It would be.

Q And would it have a label on it, "Morgenster"?

A Yes.

Q What would you do about that?

A In other words, the ship is gone or finished and the cargo is laying?

Q Yes.

A Well, the ship isn't gone and finished when I go to these doors and look.

Q Pardon me?

A When I go to these doors and look, the cargo has to be out of them doors and sent to the ship. But now if this here -- this cargo here, this draft, goes to a wrong door, which is possible, and put in with this cargo here, and then this cargo is put in front of it, you won't find it until you start to work the Nederburg cargo.

Q So then the 84/86 doesn't necessarily mean that is where it is?

A I went up as far as 84 here.

THE MAGISTRATE: His answer is unresponsive. He doesn't understand what you are asking him.

Q Who puts the 84/86 on that dock receipt?

A This here?

Q Yes.

A The checker that's receiving it. In other words, he has a location board in the checker's office.

Q That is where it is supposed to go?

A Where it is supposed to go.

Q Not where it necessarily does go.

A Nine out of ten it goes where it's supposed to go.

THE MAGISTRATE: Mr. Ries, there was testimony by a preceding witness that after the Morgenster sailed and you checked the pier you found some of the cargo from dock receipt 207 still left on the pier even though it hadn't been intentionally held or shut out. [illegible]hat so?

THE WITNESS: I think I found it with the Nederburg cargo.

THE MAGISTRATE: You found it mixed in with Nederburg cargo?

THE WITNESS: Correct.

THE MAGISTRATE: Can you remember what bay you found it?

THE WITNESS: I can't remember two years ago, the bay.

THE MAGISTRATE: Any further questions?

MR. DALEY: I have no further questions, your Honor.

THE MAGISTRATE: You are excused.

MR. DE ORCHIS: May I ask one question?

BY MR. DE ORCHIS:

Q When you found the Morgenster cargo of this shipment in with the Nederburg cargo, so that it was apparent it didn't go on the Morgenster, at that point the dock receipt that ITO keeps, should that have been changed from the Morgenster to the Nederburg, to correct your records?

A Well, the tonnage log was charged to the Morgenster. You wouldn't pick up the tonnage again on the Nederburg. Otherwise if you shut something out by error like this and it's already -- facts and figures are in, it's on the Morgenster tonnagewise, now if you turn around and pick up that tonnage again, you would be actually charging -- not billing, but I mean the tonnage of the ship couldn't come out right.

Q You would be duplicating the tonnage on the two stowage plans?

A That's correct.

Q And possibly you might be charging the company twice?

A No, no, one is getting charged.

Q But at least that would be an explanation of why the dock receipt was never changed to Nederburg, your copy?

A Well, I don't handle the dock receipts. I am not a clerk. I only do the cargo and laying out the cargo.

Q Thank you.

A You're welcome.

THE MAGISTRATE: You are excused.

(Witness excused.)

THE MAGISTRATE: Any further witnesses?

MR. DALEY: Your Honor, I just ask if I can submit at this time as Third-Party Defendant's J the offer of judgment that was made to both the plaintiff and South African Marine pursuant to Rule 68.

THE MAGISTRATE: Any objections? It may be marked.

Do you rest at this time?

MR. DALEY: I rest.

(Discussion off the record.)

THE MAGISTRATE: Are there any rebuttal witnesses?

MR. DE ORCHIS: I call Mr. Kasta.

(Document headed "United States District Court, Southern District of New York, Elgie & Company, Plaintiff, against S.S. Nederburg, Index No. 75 Civ. 5112," consisting of three pages, marked Third-Party Defendant's Exhibit J in evidence.)

NICHOLAS GERARD KASTA, called as a witness by defendant and third-party plaintiff, being first duly sworn by the notary public and stating his residence as 559 2nd Street, Brooklyn, New York, testified as follows:

DIRECT EXAMINATION

BY MR. DE ORCHIS:

Q Mr. Kasta, by whom are you employed?

J 473a

A South African Marine Corp.

Q What is your position with that company?

A Claims manager.

Q How long have you been with that company?

A Sixteen years.

Q What was your position in March of 1974?

A Claims manager.

Q As claims manager are you familiar with the company records?

A Yes, I am.

Q Are you familiar with the records that the stevedores submit to the company, such as dock receipts, tallies, stowage plans?

A Yes.

Q I show you this document which was marked as Defendant's Exhibit J for identification and ask you if you can tell us what that is.

A This was cargo that was shut out from the Weltereden.

Q Who prepares that document?

A Stevedores.

Q Can you tell us how long that document has been in use, that form?

A I received this information yesterday from our document manager, bill of lading documentation, and bill of lading is the same department. I asked him to go back to our traffic manager, Matty Percia, and see if he had a list of shutout cargo to find out when ITO started the system of making up a list such as this and sending it over to the office. Because previously they had sent over the pier copies of the dock receipts for which we made up -- from which we made out our records.

So this first list is the Weltereden list which is a few weeks after the Nederburg had sailed -- at least a few weeks.

MR. DE ORCHIS: I have no further questions.

I offer the document in evidence.

MR. DALEY: May I have a voir dire on this document, your Honor?

THE MAGISTRATE: Surely.

VOIR DIRE EXAMINATION

BY MR. DALEY:

Q Sir, do you receive this document?

A No, I do not.

Q Do you know where Mr. --

A Percia.

Q -- where he got this document from?

A He pulled it out of his files.

Q Did you see him pull it?

A No, I did not.

Q Did he just tell you what happened, that this is the first one he found?

A That's the first one that he received, that's what he told me.

Q Is that what he told you?

A Yes.

Q But you did not examine the documents to find out if this is the first one received?

A No, I did not.

MR. DALEY: Your Honor, I object to this going into evidence. There's been no foundation laid.

THE MAGISTRATE: Sustained.

MR. DE ORCHIS: I have no further questions.

THE MAGISTRATE: Any other questions?

MR. KOCHENDORFER: No.

THE MAGISTRATE: You are excused.

(Witness excused.)

MR. KOCHENDORFER: Your Honor, at this time I would like to make a motion for a verdict for the plaintiff in that we have set forth a prima facie case, and in no way did either the defendant or the third-party defendant ever overcome the evidence that the 12 were delivered to the vessel and only 11 were delivered in Durban.

THE MAGISTRATE: Decision reserved.

Any other motions?

MR. DALEY: I will wait for Mr. DeOrchis.

MR. DE ORCHIS: Your Honor, I make a motion that the complaint in this case be dismissed on grounds that the plaintiff has failed to make out a prima facie case. First, in that the plaintiff has failed to prove that the grinder or generator which he said was damaged, or, rather, was lost in this case was ever shipped. The only evidence we have is the bill of lading which acknowledges receipt of one crate, and I refer to the cases of the Circuit Court of Appeals which have held that a bill of lading is not proof of contents and that in order to make out a prima facie case the shipper or consignee must prove the contents, and not merely the receipt recited in the bill of lading, which is the receipt of the apparent condition of the case itself.

Secondly, the plaintiff has not made out a prima facie case because he failed to prove that he was the real party in interest as of the time the loss occurred. This was a shipment which was CIF Durban so that at the time the loss occurred the shipper would have still been the owner of the cargo, and in fact the shipper testified that he paid for this cargo and he then sent a replacement shipment to the consignee.

Further, there is evidence that the shipment, that there was a subrogation to some cargo underwriter and that if there was any real party in interest here, it would have been some cargo underwriter, but for reasons unknown to me they insisted on bringing suit in the name of the consignee and not in the name of the real party in interest and there has been no attempt to reconcile that defect in the case.

And the other motion I make is a motion

for judgment in the event the plaintiff recovers anything, is a motion that the defendant steamship carrier be held to be indemnified by the stevedore on the grounds that the stevedore should have taken over the defense of this case from the beginning and, secondly, that the stevedore is liable for indemnity on the basis of the implied warranty of workmanlike service which is implied from the relationship between the carrier and the stevedore.

So that we ask for full indemnity in the event the plaintiff recovers from us, including reasonable counsel fees.

THE COURT: Decision reserved. I am going to allow you all to submit posttrial memoranda. Indeed, I want you to. I do not think the facts as proved came out precisely as you had anticipated them. I know you were aware that the third-party defendant was going to attempt to assert that the missing piece had gone on the vessel to which it was originally consigned, the Morgenster. However, a substantial issue has arisen concerning the method of the stevedore in notifying the ship of split cargo, shutout cargo, accident and left-behind cargo, and you have a substantial factual issue concerning what method was being employed ; and assuming that there was an unintential split cargo, whose fault it was for not being aware that part of the cargo had gone forward.

This of course is not an issue I think you thought you would be litigating or that I thought I would be hearing and I think you will have to give a little more attention to that, at least some attention to it. Your proposed findings of fact and conclusions of law don't go near that sort of thing. I think you have got to consider where you are.

If it is factually found that one piece did go forward on the Nederburg, indeed the missing piece, that the shipper did not know it had gone forward, whose fault it was that the shipping line -- I didn't meant that; I meant the ship, that the ship did not know it had gone forward, whose fault it was that the ship did not know what effect the package limitation has under such circumstances, and where ultimate liability lies in a case of this nature.

MR. DALEY: Your Honor, I join in Mr. DeOrchis' motion as against the plaintiff only. As against the carrier's claim over indemnity against ITO, your Honor, it remains unrebutted, and Mr. Ries testified that he notified the steamship carrier: "We have this amount of cargo left on the pier."

THE MAGISTRATE: I think what he said is that he would have and he must have, but he doesn't specifically remember doing it here.

MR. DALEY: All right, as a common course. But even barring that, your Honor --

THE MAGISTRATE: But there is a dispute as to how he would have notified. He says it would have been by a written list or a telephone call. The witnesses for the South African Marine said that the procedure in force at that time was to send up copies of the dock receipt and if there is a split cargo, to indicate it from the dock receipt. And it is unquestioned that the ITO copy of the dock receipt does not indicate a split cargo, either intentional or unintentional. And there is the unresolved factual issue on which this case may turn, unexpected to all h ba85

of us.

MR. DALEY: Well, your Honor, he did testify that normally he would contact the traffic department. There has been nobody here from the traffic department to say no, he didn't notify us. Therefore I think we are entitled to the inference that they couldn't rebut the testimony.

THE MAGISTRATE: That is one of the points you are going to argue in your posttrial brief.

MR. DALEY: Well, there is another point I would like to raise also, your Honor. Both the plaintiff and the defendant ocean carrier admitted that 11 went on and were discharged from the Nederburg. In my requests for admission the attorneys for South African Marine admitted that 11 were loaded on the Nederburg.

THE MAGISTRATE: They were cross examining about the difference between a 3 and a 4. If the 3 is correct, it adds up only to 10.

MR. DALEY: But they have already admitted that the 11 were on and the plaintiff has already admitted that 11 came off, so the whole quesh ba86

tion revolves about what happened to the other case.

Mr. Santisi testified that went aboard the Morgenster. There's been no testimony to rebut that.

THE MAGISTRATE: Mr. Daley, you are giving me argument which right now I would prefer not having. You can put that in that posttrial brief.

How long will you need to submit these briefs? How long after the two weeks for transcript?

MR. DE ORCHIS: I am taking testimony in Europe from 3rd to May 15th.

THE MAGISTRATE: How long?

MR. DE ORCHIS: Middle of June.

THE MAGISTRATE: All right. I take it all of you don't mind waiting until the middle of June to submit your briefs. However, it does create an unprecedented possibility in the history of the federal courts, and that is that I will have heard this case as a magistrate by stipulation, but I will be a district court judge at the time I decide it.

THE MAGISTRATE: May we have a stipulation for the record that your previous stipulation agreeing to let me try the case will be in force even if I am a district judge at the time I decide it.

MR. KOCHENDORFER: So stipulated.

MR. DE ORCHIS: So stipulated.

MR. DALEY: Your Honor, there is just one additional thing I would like to add.

In relation to our counterclaim against the steamship carrier, we are requesting in that we be indemnified for any amounts the plaintiff might recover,plus costs and attorneys fees also. That is also in our pleadings.

THE MAGISTRATE: All right, I want your trial briefs in by June 10th. If you are going to submit any rebuttals, they must be in three working days later. In other words, if you go over a weekend, that doesn't count, but three working days later any rebuttal memoranda must be in. Because if it is humanly possible, I want to have this matter out of the way before the end of June.

MR. KOCHENDORFER: How do you want

to handle the exhibits?

THE MAGISTRATE: Keep your own exhibits now and resubmit them to me with your trial memo. I assume you will need your exhibits for the trial memo.

MR. DE ORCHIS: Just a point of housekeeping. This was the shutout piece from the Nederburg and there was a question about this being a Xerox or why was it torn out. I have the original which shows the top part had nothing to do with this ship. Now, I can substitute it unless you say that might go to the weight of the evidence.

THE MAGISTRATE: It could conceivably. You wish to take the original rather than the copy?

MR. DE ORCHIS: We will substitute the original.

THE MAGISTRATE: All right. Let the reporter re-mark it.

MR. MULROY: This is a defendant's exhibit rather than a third-party exhibit. We need it for writing our brief. It is our actual exhibit. We own it.

THE MAGISTRATE: Do you mind loaning it back to them?

MR. MULROY: No.

(Original document headed "Levanter DR to Nederburg," consisting of one page, was substituted for and marked Defendant's Exhibit H in evidence.)

- -

Plaintiff's Exhibit 1

(South African Marine Corporation Bill of Lading
No. 66, Dated March 15, 1974)

[Photostats]

(Opposite) ☛

SOUTH AFRIC[illegible] MARINE CORPORATION ([illegible]), as Agents 3/19/76

SHIPPER/EXPORTER

SHARON CONTINENTAL
40 HUMBOLDT ST.
ROCHESTER, NEW YORK

DOCUMENT NO. A-7

EXPORT REFERENCES

CONSIGNEE

ORDER OF SHIPPER

FORWARDING AGENT, REFERENCES

COPELAND SHIPPING INC. 11321-02
SUBSIDIARY: JET AIR FREIGHT — FMC #1095 — FMC #92
JAMAICA, N.Y. 11422 (212) 241-2

POINT AND COUNTRY OF ORIGIN

NOTIFY PARTY

ELGIE & COMPANY
P.O. BOX 1899
DURBAN

DOMESTIC ROUTING/EXPORT INSTRUCTIONS

RECEIVED ON BOARD
MAR 22 1974
SOUTH AFRICAN
MARINE CORP. (N. Y.)
PER

PIER

[illegible] TERMINAL

EXPORTING CARRIER (Vessel and Flag) S.A. NEDERBURG

PORT OF LOADING NEW YORK

ONWARD INLAND ROUTING

PORT OF DISCHARGE DURBAN

FOR TRANSSHIPMENT TO

Spaces above are for shippers' memoranda — not part of bill of lading

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
ELGIE & COMPANY PO BOX 1899 54-55 GARDINER ST DURBAN SOUTH AFRICA	11 1	TW.CTNS: } OPTICAL MACHINERY & CRATE: } ACCESSORIES.	4512	381
403M, 291M, 290M 289M, 288M, 287M 286M,		L/C# FB 1396		
		"FREIGHT PREPAID" ON BOARD	Freight Prepaid (Date) South African Marine Corp. (N.Y.) By	
		G-DEST. SOUTH AFRICA		

RECEIVED
26 APR 1974

These Commodities Licensed by the U. S. for Ultimate Destination SOUTH AFRICA
Diversion Contrary to U. S. Law Prohibited.

*as identified on the reverse side and referred to herein as "the carrier." Neither South African Marine Corporation (N.Y.), nor any other person, firm or corporation other than the carrier, whether or not its name is stated elsewhere herein, assumes any of the duties, responsibilities and liabilities stated herein as being those of the carrier.

Ship operated for account of:→ CARRIER NO. 1
(See on reverse side)

P-1-1

FREIGHT:

.... @	....	per 40 cu. ft.	$
.... @	....	per 40 cu. ft.	$
.... @	....	per 2240 lbs.	$
.... @	....	per 2240 lbs.	$
.... @	....		$
.... @	....		$
		TOTAL FREIGHT	$

In witness whereof 3 (Three) Bills of Lading, all of the same tenor have been signed, one of which being accomplished the others to stand void.

B/L No. [illegible]

Month [illegible] Day [illegible] Year 19[illegible]

DATED AT PORT OF LOADING SHOWN ABOVE

FOR AND ON BEHALF OF MASTER

By

AS AGENTS ONLY

PL#'s E.#2 f. 52

SOUTH AFRICAN MARINE CORPORATION, LTD. (Carrier No. 1)
SPRINGBOK LINE, LTD. (Carrier No. 2)
SPRINGBOK SHIPPING COMPANY, LTD. (Carrier No. 3)

B. P. CENTRE,
THIBAULT SQUARE, CAPETOWN
REPUBLIC OF SOUTH AFRICA

GENERAL AGENTS
IN U.S.A.:
SOUTH AFRICAN MARINE CORPORATION (N.Y.)
17 BATTERY PLACE
NEW YORK, N. Y. 10004

Telegrams: "Safmarco, New York"

SHURON CONTINENTAL
E Swanson

SHORT FORM BILL OF LADING

RECEIVED the goods, or packages said to contain goods herein mentioned, in apparent good order and condition unless otherwise indicated to be transported and delivered or transhipped as herein provided.

This Short Form Bill of Lading is issued for the shipper's convenience and at its request, instead of the carrier's regular form of Bill of Lading. It shall have the effect subject to the provisions of the U.S. Carriage of Goods by Sea Act, 1936, or of the Carriage of Goods by Sea or similar Act in force in the locality where this Bill of Lading is issued.

All the terms of the carrier's regular form of Bill of Lading are incorporated herein with like force and effect as if they were written at length herein. A copy of such Bill-of Lading is on file with the Federal Maritime Commission of the U.S.A., and may be obtained from the carrier, it's agents or the master.

Particular attention is called to the following provisions in the Carrier's Regular Form Bill of Lading:

The vessel, with any part of the goods on board, either before or after proceeding toward the port of discharge and for any purpose whatever that the master may consider advisable, may stay in port, adjust compasses, dock, go on ways or to repair yards, shift berths, lie on the bottom in berth, move from place to place in any port, take fuel or stores, load or discharge cargo, sail without pilots, tow and assist vessels or be towed, save life, property of the carrier or others, proceed via the Panama Canal and/or Straits of Magellan and/or Cape Horn and/or Suez Canal and/or Cape of Good Hope or otherwise by any route or through any waters whatever. The vessel may omit calling at any port, whether scheduled or not, may deviate from, or change the advertised, usual, geographical or intended route at any stage of the voyage and may proceed beyond or in a contrary direction to or outside the usual route to the port of discharge and may proceed to and stay at and load or discharge at any place whatever, as inducements may offer, backwards or forwards, once or oftener, and may load, carry or discharge cargo at, for or between intermediate or other ports, whether on this voyage or a preceding or subsequent voyage, even though two or more of such voyages may overlap. Any such procedure shall be considered within the voyage herein intended as fully as if specifically described herein.

Without limitation of any other provision herein, in any situation whatever or wherever occuring and whether existing or anticipated before commencement of, or during the voyage, which, in the judgment of the carrier is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to, or loss of the ship or any part of the cargo or to make it unsafe, imprudent or unlawful for any reason to commence or continue the voyage, or to give rise to delay or difficulty in arriving, entering, discharging at or leaving the port of discharge or the usual or intended place of discharge in such port, the carrier may decline to load, or before or after loading or before the commencement of the voyage may require the shipper or other person entitled thereto, to take delivery of the goods at port of shipment and on their failure to do so, may warehouse the goods at their risk and expense; or the carrier, whether or not proceeding toward or attempting to enter the port of discharge, may proceed by any route or return directly or indirectly to or stop at such other port or place whatever as the carrier may consider safe or advisable under the circumstances, once or oftener, backwards or forwards in any order and discharge the goods at any place he may select there, or the carrier may retain the cargo on board until a return trip or until such time as the carrier thinks advisable and discharge the goods at any place whatever as herein provided, or the carrier may discharge and forward the goods by any means whatever, all at the risk and expense of the goods. The carrier is not required to give notice of discharge or forwarding. Whenever the goods are discharged from the ship they shall be at their own risk and expense. Such discharge shall constitute complete delivery and performance under this contract and the carrier shall be free from any further responsibility. The carrier shall be entitled to a reasonable extra compensation for any services in connection with the foregoing above the agreed freight.

Full freight to port of discharge named herein shall be considered completely earned on receipt of the goods by the carrier, whether the freight be stated or intended to be prepaid or to be collected at destination; and the carrier shall be entitled absolutely to all freight and all charges due hereunder, whether actually paid or not, and to receive and retain them under all circumstances whatever, ship and/or cargo lost or not lost. Freight is payable to ship's agent by transferable currency. Rate of exchange for payment of freight will be the applicable Bank T/T selling rate on New York prevailing on date of payment or on date of vessel's arrival at the port of discharge whichever date is earlier.

All agreements or freight engagements for shipment of goods are superseded by this Bill of Lading and all its terms, whether written, typed, stamped or printed, or incorporated by reference are agreed by the shipper to be binding and to govern the relations, whatever they may be, between those included in the words "shipper" and "carrier" as defined in the carrier's regular form of Bill of Lading. One signed Bill of Lading duly endorsed, will be surrendered, if requested, to the agent of the vessel at port of discharge in exchange for delivery order.

P-1-2

(CONTINUED ON REVERSE SIDE)

Plaintiff's Exhibit 2

(Deposition of Paul Shambo with Exhibits)

Statements

Examinations Before Trial

Depositions

Conferences

Conventions

Arbitrations

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -

ELGIE & COMPANY,

Plaintiff,

74 Civ. 5112 RO

-vs-

S. S. "S. A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant & Third Party Plaintiff,

-vs-

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third Party Defendant.

- -

DEPOSITION of PAUL F. SHAMBO,

taken in the above matter at the offices of Shuron Continental, 40 Humboldt Street, Rochester, New York, on Friday, January 23rd, 1976, commencing at approximately 11:00 A.M., before ROBERT J. KANE, Notary Public.

925 Granite Building
130 Main Street East
Rochester
New York 14604

APPEARANCES:

BIGHAM, ENGLAR, JONES & HOUSTON,
By JOHN KOCHENDORFER, Esq.,
99 John Street,
New York, New York, 10038,
Appearing for the Plaintiff.

HILL, RIVKINS, CAREY, LOESBERG
& O'BRIEN,
By ROBERT E. DALEY, Esq.,
96 Fulton Street,
New York, New York, 10038,
Appearing for Third Party Defendant.

NIXON, HARGRAVE, DEVANS & DOYLE,
By GARY L. VALBY, Esq.,
Lincoln First Tower,
Rochester, New York,
Appearing for Shuron Continental.

STIPULATIONS:

It is hereby stipulated, by and between the attorneys for the respective parties herein, that the signing and filing of the transcript be waived, and that any and all objections, except as to the form of the question, be reserved until the time of trial. It is further stipulated that the presence and oath of the Referee be waived, and that the Stenographer may swear in the witnesses.

PAUL F. SHAMBO, 1152 Mendon Center Road, Honeoye Falls, New York, after being duly called and sworn as a witness in these proceedings, testified as follows:

EXAMINATION BY MR. KOCHENDORFER:

Q. Will you state your name, address, and position here?

A. Paul F. Shambo, 1152 Mendon Center Road, Honeoye Falls, New York. I'm the Manager of the International Division here at Shuron.

Q. And were you employed by Shuron in December of 1973?

A. Yes.

Q. And what was your position at that time?

A. I was then in charge of all corporate communications and marketing communications.

Q. And on what date, if you can remember, or approximately what date did you take the present position?

A. Approximately August 1, '74.

Q. Do you remember an incident in December of 1973 relating to a shipment of cargo to Elgie & Company in South Africa?

A. I remember it only because I was involved in the replacement shipment of a loss of a machine.

Q. And why do you recall this incident?

A. It was the first trauma that I went through when I took my new assignment at International because I had only been in the job a few days and Mr. Elgie himself telephoned me from Durban, presenting his problems, and asking me to solve them quickly because he didn't have the machine that he was expecting and at the time I was a little wet behind the ears and I had to do a little wheel bending. It's the first problem I handled when I took over the whole division.

Q. Now, in your handling of your present job here, are you familiar with certain documents that Shuron Continental has?

A. Sure.

Q. In the conducting of their trade?

A. Sure. Yes.

Q. And at my request did you review the files and attempt to locate certain documents pertaining to a shipment in December of 1973?

A. Yes.

Q. And did Shuron Continental Corporation at that time maintain records with reference to sales and shipments of goods in the regular course of business?

A. Yes.

Q. And did you find there was entry of certain information recording a sale to Elgie Corporation at that time?

A. Yes.

Q. And I want to show you here a nine-page set of documents --

MR. DALEY: If I may, is this just the set of invoices, or --

BY MR. KOCHENDORFER:

Q. This is the invoices, yes, a nine-page set of documents here, and I ask you if you could identify that set of documents. First of all, what type of document is it?

A. These are the original computer generated -- excuse me. Right, this is the customer's copy of the computer generated invoice as a result of a sale by our company.

Q. And is there a signature on that invoice?

A. Yes. Signed by the girl who was at the time my secretary who handled the transferring of the documents.

Q. And that name was --

A. Susan Ford.

MR. KOCHENDORFER: Could I mark this for identification?

(Whereupon, Plaintiff's Exhibit No. 1 was then received and marked for identification.)

BY MR. KOCHENDORFER:

Q. It's been marked as Plaintiff's Exhibit No. 1, for identification, and could you review that and see if on that particular invoice there is -- excuse me, strike that. Let's go back a step. A moment ago we were referring to a shipment that was transported to Africa, to Elgie Corporation, which is the subject matter of the Complaint here, and this was a one case non-delivered, alleged in the Complaint, and in order that we can relate to that I want you to identify also a bill of lading. Did you receive -- or, first of all, do you recognize the document?

A. Yes.

Q. And did you receive a copy of that?

A. Yes.

Q. And who did you receive that from?

A. Copeland Shipping.

MR. VALBY: Just a minute. When you say "you receive", do you mean you personally received it? Were you in your present position when this was received?

THE WITNESS: No. Company received.

BY MR. KOCHENDORFER:

Q. All right. Now, can you correlate this particular bill of lading with the invoice you just cited?

A. Yes. Do you want me to do that?

Q. Yes. If you would, please, could you describe how that was correlated? Well, excuse me, let's mark this.

(Whereupon, Plaintiff's Exhibit No. 2 was then received and marked for identification.)

THE WITNESS: They refer to 286M. M numbers are the technique our particular company uses to ride shipments. To identify shipments.

BY MR. KOCHENDORFER:

Q. And could you show us on this invoice the eleven cartons and the one crate and how they are identified on the bill of lading?

A. That's difficult, but you'll find all of these M numbers in this stack of papers. Okay? But one of the eleven or twelve boxes does not necessarily mean there's an invoice per box. An invoice may be three partial boxes, these refer to goods, not boxes.

Q. But the total sum of goods on this are equal to the total sum of goods on this bill of lading?

A. Yes.

Q. And on this invoice do you find an item on there with an invoice value representing what would be the one crate on the bill of lading?

A. Yes.

Q. And which item is that?

A. It is the generator on Invoice No. 373985, referred to as a 390-D generator, "gen" abbreviation for generator, 50 cycle, and so forth, optical grinding machine.

Q. And do your records reflect that was the generator sold to Elgie & Company?

A. Yes.

Q. And subsequent to this sale, did you arrange to have this particular crate shipped to Elgie & Company? That is, did Shuron Continental have the --

MR. DALEY: Are we dealing with this man's personal knowledge or what?

MR. KOCHENDORFER: I changed the question, I said -- because he indicated before he was not in the position at the time it was shipped.

MR. DALEY: Okay.

BY MR. KOCHENDORFER:

Q. Do your records reflect that the item was shipped to Elgie & Company?

A. The one in 1973?

Q. Yes.

A. Yes.

Q. And subsequent to that and your receipt of information from Africa, from Elgie & Company, did you subsequently ship an additional generator of the same type?

A. Yes. We replaced the machine with an additional machine, right.

Q. And do you have an invoice for that particular machine?

A. Yes. I have a copy of a --

Q. And what was the value on the replacement machine?

A. The machine only, apples to apples, had an -- experienced a price increase in between shipments. The value -- the price of the replacement machine was Nine Thousand Five Hundred Thirty Seven Dollars.

MR. DALEY: Are you going to have that marked, the additional invoice?

MR. KOCHENDORFER: Do you want it marked?

MR. DALEY: I want it marked, because I'm going to ask him about it.

THE WITNESS: This is a Xerox.

MR. VALBY: Give him what you have.

MR. KOCHENDORFER: Mark that one.

(Whereupon, Plaintiff's Exhibit No. 3 was then received and marked for identification.)

BY MR. KOCHENDORFER:

Q. Then if I understand you correctly, the item on the earlier invoice which was reflected at Eight Thousand Six Hundred and Seventy is now reflected on this invoice, a replacement of --

A. Nine five three seven.

Q. Now, the price on the invoice here, on the particular page that we are feferring to, does that include insurance and freight?

A. No.

Q. And on the last page of Plaintiff's Exhibit No. 1, has there been insurance and freight set forth?

A. Yes.

Q. So that in order to obtain the C.I.F. value of the cargo you would add a pro-rational portion of the insurance and freight to the invoice value on the earlier page?

A. Yes. We would call that landed value, landed price.

MR. KOCHENDORFER: Do you want him to make a direct computation of the pro-rata portion --

MR. DALEY: I don't know if the shipping charges were the same on each crate. I don't know if the invoice reflects what the shipment charges on each specific crate was. I don't know if he can.

MR. KOCHENDORFER: I don't think he can,,and this is why I was going to ask him to make an approximate estimate of what it would be from his knowledge in shipping and we can establish from the steamship carrier, who is not present at the time, present at this deposition, as to what the charges were.

MR. DALEY: That, of course, would depend upon a freight bill, how that broke down, or if they broke it down.

MR. KOCHENDORFER: Do you have a freight bill?

THE WITNESS: No.

MR. KOCHENDORFER: I might put on the record the reference to the steamship carrier, the Defendant South African Marine Corporation, does not appear today by counsel. They were provided with a notice of the deposition and they were notified in addition by telephone as to the date and place and time of the deposition, and to my understanding they have chosen not to attend.

BY MR. KOCHENDORFER:

Q. Could you make a rough estimate as to the amount of the C.I.F., or amount of the insurance and freight which would be added to this particular case to give a C.I.F. value?

A. No.

Q. You could not?

A. No.

Q. You do not have the freight bill with you?

A. No.

Q. Do your records indicate that you were paid for this particular shipment?

A. Yes.

Q. Paid in full?

A. Yes.

MR. VALBY: This is the first shipment, the shipment of the first machine?

BY MR. KOCHENDORFER:

Q. The first shipment you were paid in full for?

A. Yes.

Q. And you were paid by Elgie & Company?

A. Yes.

Q. And how was that done? If you know. Was it through a check or a letter of credit or --

A. Letter of credit.

Q. It was done through a letter of credit?

A. Irrevocable letter of credit.

Q. Did you ever receive a copy of the dock receipt?

A. No.

MR. KOCHENDORFER: That's it.

EXAMINATION BY MR. DALEY:

Q. Mr. Shambo, on what date were you first notified of the problems on this shipment, particularly the shipment in suit?

A. Very difficult to pin it down.

Q. Approximately. Do you have any documents there that advise you of a problem with the shipment?

A. I have dozens of telexes from a frustrated Mr. Elgie. Just going to take a minute. One of them said "Help, I need a machine."

Q. Could I see a copy of those telexes?

A. Yes. Let me find the earliest one. Okay? Really, there was an incredible volume of telexes. Okay. You see the name Larner, that was my predecessor, he's retired from the company. You know how to read a telex? There's the date up here, the sendee, the sender is down here, and the addressee --

Q. That's good.

A. I think there were some earlier.

Q. And the date on this is January -- is this the -- what is the date on this telex?

A. This one happens to be July 1st, 1974. Here is one of May 20, 1974, which is also relevant. Here is one of April 26, '74.

Q. What is the other one?

A. That's an internal memorandum.

Q. Okay.

A. And the other two refer to shipments which had nothing to do with this.

MR. DALEY: Could I have these three telexes marked?

(Whereupon, Third Party Defendant Shambo Exhibits A, B, and C were then received and marked for identification.)

BY MR. DALEY:

Q. Mr. Shambo, before you came here this morning, did you talk to Mr. Kochendorfer?

A. Yes.

Q. And when did you talk to Mr. Kochendorfer?

A. I was introduced to him on the telephone, he introduced himself to me on the telephone and then he arrived here this morning a few minutes before you did.

Q. Did Mr. Kochendorfer have an opportunity to speak to you before this deposition?

A. Yes.

MR. DALEY: I would appreciate it if you wouldn't shake your head.

MR. KOCHENDORFER: I'm sorry, I was just shaking my head, I'm sorry.

BY MR. DALEY:

Q. And did you discuss the subject matter of this litigation?

A. We only went over the relevant documents that he brought. That he has shown you.

Q. How long have you been doing business with Elgie & Company?

A. How long has Shuron been doing business with Elgie & Company?

Q. Right.

A. So long that I wouldn't be able to answer the question accurately.

Q. And do you know what type of operation Elgie & Company is?

A. Yes.

Q. What type of an operation do they have?

A. It is basically an ophthalmic grinding laboratory and also an optical import business.

Q. Do they import glasses, or what do they import? Do they import the raw materials to make glasses or contact lenses?

A. The only understanding that I have of their business, which is the part that I deal with, is that they process raw material.

Q. Do you sell them the raw materials?

A. We sell them the machines that they use to grind prescriptions and we sell them some raw glass.

Q. And how much business does Elgie & Company do with your company per year, approximately? If you know.

A. I really, off the top of my head, I couldn't tell you.

Q. Do you have one shipment a year, two shipments a year, five, ten?

A. I don't know. I'm just not prepared to answer the question.

Q. Would it be unusual in the course of one year to order more than one generator? I believe you identified the case in question was a generator, is that correct?

A. Can I have the question again?

Q. The case in question, I believe you said it was a generator, is that correct?

A. Yes.

Q. During the course of a year, would they order more than one generator or could they order more than one generator?

A. Well, they certainly could, probably not, although really it's totally dependent on the volume of business they are doing.

Q. But could they?

A. Incidentally, I want to volunteer one bit of information, this is not an electrical generator, this is an industry term referring to the generation of curves, ophthalmic curves on ophthalmic lenses. It's a very --

Q. In other words, it's just a machine in order to cut lenses?

A. It's an optical grinding machine.

Q. Could Elgie & Company order more than one of these generaters in the course of one year?

MR. KOCHENDORFER: I think that's the kind of question that calls for a conclusion that's speculation, I'll object to the form.

MR. DALEY: Okay. Would you answer the question?

MR. VALBY: Could they?

THE WITNESS: They could.

BY MR. DALEY:

Q. And you've been doing business with Elgie over a long period of time?

A. Yes.

Q. Have you reviewed your records to find out if in the course of one year they've ordered more than one machine?

A. No.

Q. So you don't know whether or not they could have in prior years?

MR. VALEY: Whether they did?

BY MR. DALEY:

Q. No, whether they could have in prior years prior to '73, ordered more than one generator in the course of a year.

A. I can't answer the question.

Q. Sir, your position at the time of this shipment was what? If you could explain the course of your duties, and so on.

A. The first shipment?

Q. The first shipment, correct.

A. I was in charge of all corporate communications, advertising, public relations, corporate relations with our parent company, Textron, Inc., and at the time had a training assignment in the international area, handling Canada as a marketing area.

Q. Did you deal with Elgie & Company at that time?

A. No.

Q. You did not? Did you take part in the negotiations between Elgie & Company and Shuron International? for the purchase of this shipment?

A. At which shipment?

Q. At the time of this -- this particular shipment, at the time of purchase, were you in on the negotiations between Elgie & Company?

A. No.

Q. Who was?

A. Mr. Larner.

Q. That's the man that signed these various telexes?

A. Yes.

Q. Do you have any documents in your file which would show the preliminary negotiations between Elgie & Company and Shuron International?

MR. VALBY: Off the record.

(Discussion off the record.)

THE WITNESS: The answer is no.

MR. DALEY: Do you have a contract between

Elgie & Company and Shuron International?

MR. VALBY: Just a minute. Off the record.

(Discussion off the record.)

THE WITNESS: Yes. We have an order.

BY MR. DALEY:

Q. Okay. May I please see that? This whole batch?

A. This is a typewritten list, very detailed, technical list of exactly what parts were to go in each machine, and so on and so forth, and a Xerox copy of the irrevocable letter of credit.

MR. DALEY: May I please have this marked as Third Party Defendant Shambo Exhibit D, consisting of five pages?

(Whereupon, Third Party Defendant Shambo Exhibit D was then received and marked for identification.)

BY MR. DALEY:

Q. Now, was this -- could you please identify this document and explain to me exactly what it is?

MR. KOCHENDORFER: Referring to --

BY MR. DALEY:

Q. Referring to Exhibit D.

A. The first three pages, three typewritten pages is a detailed list necessary for Shuron to ship the machines in question precisely the way the customer has asked for them. The items list, among other things, the generator, the optical grinding machine we talked about, and some other things that were ordered at the same time.

Q. I see. Now, the optical grinding machine -- all right?

A. Yes.

Q. What specifically is included in the optical grinding machine? Is it just the machine by itself or what?

A. The company's procedure -- well, we sell a base machine, as one would buy a car at first, and depending on the customer's usage, needs, whatever, add sub-assemblies and spare parts and custom things to that machine, depending on what he wants and also depending on the electrical current in the country it happens to be going to.

Q. What is the effective date of this listing, do you know?

A. I have no idea.

Q. Was this prior to the time of the shipment in question, prior to the --

A. It had to be because this is what we worked from.

Q. I believe you identified it as Invoice No., this would be Plaintiff's Exhibit No. 1, for identification, page 8, right? And does this describe exactly what was included in just that one machine?

A. No, it doesn't, for the following reason. This is a screwy industry we are in, the base machine has a base price.

Q. Correct.

A. But the machine ordered with the different configurations does not necessarily change the price, it just changes the nuts and bolts, wires, whatever inside the machine, the base price remains the same. This generic reference to 390-D, 50 cycle is as close as we ever come to describing the unit, otherwise you end up with an invoice fifteen pages long with all kinds of engineering talk that is not necessary.

Q. This 390-D was the one stored in the case, the case in the shipment in question, is that right?

A. Right.

Q. And what is the price listed?

A. Eight Six Seven Zero.

Q. Now, you stated that Exhibit D that was marked for identification was a price listing prior to the shipment, or prior to the date of this invoice. What is the price there?

A. I didn't say that.

Q. What did you say?

A. I said this is something received from Elgie listing those goods that they want. This in no way reflects an agreement that the prices he's typed out are the prices --

Q. In other words, these are Elgie & Company prices?

A. That's his typing, to my knowledge.

Q. Now, what is the price on there?

A. Eight Eight Seven Zero.

Q. Now, the Eighty Eight Seventy, is that less than your actual invoice price?

A. No.

Q. It is not?

A. No.

Q. I thought you stated it was Eighty Six Seventy?

A. That's more than Eighty Six Seventy.

Q. So Elgie's price is more than your invoice price, is that correct?

A. Right.

Q. Do you know why it's more?

A. I have no idea.

Q. Do you send him a price listing on the various materials that you have?

A. I would assume under normal circumstances we did, yes.

Q. So is it possible at the time Elgie & Company sent you this price listing prior to December of 1973, that the cost of this machine was more than it was in December of 1973?

A. No.

Q. Why not?

A. Because Shuron is very selfish, and when there's a doubt it was a published price, and that was the published price.

Q. Where did Elgie & Company get this price?

A. I have no idea.

Q. Referring to Third Party Defendant Exhibit D.

A. Right. I might volunteer this is my experience in the International area, when transferring from one currency to the other there's always a slight price variation depending on the valuation of the currency at the time.

Q. So, in other words, the price of the goods could fluctuate?

A. The apparent price could fluctuate, sure. That's why we always refer to Shuron price list, U. S. Dollars.

Q. Now, sir, did you arrange for the shipment or did Shuron International arrange for the shipment?

A. No.

Q. You did not?

A. No.

Q. Where were the goods packed?

A. Tampa, Florida.

Q. Tampa, Florida?

A. Yes.

Q. Does anybody in this office have any knowledge of the actual packing of these goods?

A. No.

Q. Does anybody in this office have any knowledge of the type of markings on each case?

A. I do.

Q. Personal knowledge?

A. I have personal knowledge of what the normal procedure is.

Q. No, I'm not asking that, I'm asking do you have personal knowledge of what was actually packed into each case?

A. No.

Q. So is it possible that this case was supposed to, according to the documents, have a generator in it, but is it your testimony today that you don't know whether or not a generator went into that case?

A. I have no personal knowledge.

Q. So it was -- where in Tampa, Florida, was this stuff packed?

A. Shuron factory in Tampa.

Q. I see. Now, sir, I notice that the date on this invoice is December 7th of 1973, is that correct?

A. Yes.

Q. Is it normal for Shuron International to send -- was it the normal procedure of Shuron International to send an invoice a month before shipment, two months before shipment, how long before?

A. It was a normal business procedure for Shuron, because of its own inherent E.D.P. systems -- inherent electronic data processing systems to make an effort to date the invoices as close as possible to the day our products leave our docks.

Q. In other words, based upon your company procedures, all right? This shipment left your Tampa plant in December of 1973, is that correct?

A. I really can't answer that accurately.

Q. Didn't you just say it's company procedure that the date it leaves the dock is the date of your invoice?

A. It's as close as possible.

Q. I understand that, but based upon the date that it left your Tampa factory, it was in December of 1973, would that be correct?

A. It's within reason that it's close to that date, yes.

Q. Do you know where the shipment was stored between December of 1973 and March of 1974?

A. No idea.

Q. And I believe you previously stated you had no personal knowledge of what went in each case, is that correct?

A. That's correct.

Q. Do you know the date that the shipment arrived in the port of New York?

A. No.

Q. Do you know who -- who did you use, or who did Shuron International use to get the shipment from Tampa to New York?

A. It was an inland trucker, I don't really know which one. I'm sure it's on somebody's records. We use a number of inland truckers, it was an inland trucker.

Q. And what was the normal procedure of Shuron International, like the date of the invoice, December, 1973, what would be the normal time span between the date of the invoice and the date of the shipment?

A. I have absolutely no control over that and no knowledge. We try to do the best for our customer, period.

Q. Would you say four months would be a long time between the date of the invoice and the date of the shipment?

A. No.

Q. You wouldn't say that would be a long period of time?

A. No, not at the time.

MR. VALBY: Can we go off the record just a minute?

(Discussion off the record.)

BY MR. DALEY:

Q. Now, sir, the date on this invoice is December, 1973. Do you know when the various documents were presented to the bank for payment?

A. No idea.

Q. Do you have any records which would show that?

A. No.

Q. Do you have any knowledge of shipping practices?

A. Yes.

Q. Is it normal that a dock receipt be issued as soon as the cargo is received on the pier?

A. I have no idea.

Q. When would a bill of lading be issued?

A. I have no idea.

Q. You have no idea?

A. I would like to correct myself, the knowledge I have is Shuron's procedures and what we do to get our -- but I'm not an expert on --

Q. I'm not asking if you are an expert, just if you are familiar.

A. Not in that way.

Q. When this shipment was taken from Tampa to New York, you don't know what trucker did it?

A. No.

Q. Did you use a freight forwarder?

MR. VALBY: Off the record.

(Discussion off the record.)

THE WITNESS: Yes.

MR. DALEY: You do?

MR. VALBY: Off the record again.

(Discussion off the record.)

BY MR. DALEY:

Q. Do you use a third party to take care of your documentation and everything on export shipments?

A. Yes.

Q. And in this particular situation, who did you use?

A. Copeland.

Q. Where are they located?

A. I don't know where their corporate offices are, I think it's in Brooklyn, or something. Jamaica, New York.

Q. Jamaica? Could you tell me the procedure that Shuron International would follow in relation to Copeland?

A. No, I can tell you the procedures that Shuron follows, period.

Q. Okay, that's fine.

MR. VALBY: Follows now, is that what you mean?

THE WITNESS: Yes.

MR. VALBY: You have no personal knowledge of exactly what procedures were followed with respect to this shipment, is that right?

THE WITNESS: Only because of reviewing the situation.

MR. VALBY: Yes, but you have no personal knowledge?

THE WITNESS: No.

BY MR. DALBY:

Q. Okay. What is Copeland's procedures now, or Copeland's procedures as far back as --

A. The only thing I can tell you is that we prepare a shipment, build the crates to spec and whatever, and the shipment is then consigned to an inland trucker at our dock. That's F.O.B. our shipping point, and when it leaves our dock we kiss it goodbye. After that, I don't know what happens.

Q. You sell these shipments F.O.B. your shipping point?

A. Yes.

Q. In other words, if it leaves Tampa -- when it leaves the dock at Tampa --

A. Goodbye.

Q. -- that's the end of it, is that right?

MR. VALBY: Don't answer that question, that calls for a legal conclusion which the witness is not competent to give.

BY MR. DALBY:

Q. Okay. Who would present the documents to the bank for payment? If you know.

A. I don't know.

Q. Would Shuron International?

A. No.

Q. No? You don't know?

A. Shuron does not.

Q. Shuron doesn't? Do you have an agent?

A. Correct that, in the letter of credit case Shuron does not handle any documents.

Q. Who does?

A. I have no idea.

Q. Sir, I show you a letter of credit and ask if this would give you any information as to who presented these documents to the bank for payment.

MR. VALBY: Off the record.

(Discussion off the record.)

MR. DALEY: Would you please repeat the question?

(Whereupon, the last question by Mr. Daley was then read by the Reporter.)

BY MR. DALEY:

Q. And specifically referring to Defendant's -- Third Party Defendant Exhibit D, page number 4.

A. I'm not familiar with this letter of credit form. I don't know, maybe a banker could help.

Q. Well, did Shuron contact the bank to set up a letter of credit?

A. I don't know how it was done at that time.

Q. You do not know how it was done?

A. No.

Q. Okay. Now, do you know how you get paid pursuant to a letter of credit, Shuron International, or how they ultimately get paid?

MR. VALBY: Now or then?

BY MR. DALEY:

Q. Now.

A. Now? Of course I know.

Q. How do they get paid? What do they have to present to the bank against an irrevocable letter of credit?

A. Now, we present nothing, the freight forwarder presents it on our behalf.

Q. Do you know what they were doing back in December of 1973?

A. No.

Q. Do you know what documents the freight forwarder would present to the bank?

A. No.

Q. Okay. Does this invoice state whether or not this shipment was F.O.B., C.I.F., S.A.F., does it state?

MR. VALE[illegible]: Off the record.

(Discussion off the record.)

THE WITNESS: The answer to the question is no.

BY MR. DALEY:

Q. This document doesn't say whether it is C.I.F. or F.O.B.?

A. No.

Q. Would you read the last line with the tabulation Twenty Three Thousand Two Forty Four Twelve?

A. "C.I.F. Durban, $23,244.12".

Q. I believe you testified before that your normal procedures were F.O.B. shipping plant, is that correct?

A. Yes.

Q. Why wasn't an F.O.B. shipping plant used in this case?

A. It was.

Q. Then why does the document say "C.I.F. Durban"?

A. The document has been amended by the ocean forwarder, the freight forwarder.

Q. Where does it say that?

A. The freight forwarder adds all the necessary calculations to come up with the C.I.F. for purposes of the South African government.

Q. Anything on here to say the shipment was F.O.B.?

A. No.

Q. Nothing? And you weren't down in Tampa at the time this document was executed?

A. No.

Q. Do you know if the base term of this contract was C.I.F. or F.O.B., personally?

MR. VALBY: Off the record.

(Discussion off the record.)

THE WITNESS: I have no personal knowledge.

BY MR. DALBY:

Q. Okay. I show you Third Party Defendant Shambo Exhibit D, the fourth page, and ask you if it has price terms on it?

A. If it has a what?

Q. A price term on it?

MR. VALBY: Off the record.

(Discussion off the record.)

BY MR. DALEY:

Q. In relation to the letter of credit which is Third Party Defendant Exhibit D, does it state on that letter of credit, "Sight for 100 percent of the C.I.F. invoice value of optical machinery/accessories"?

A. Yes.

Q. On that document or in any other document is there any specific instructions by Shuron International that these goods had to be carried on a specific vessel?

A. No.

Q. Is there anything in any of your documents that say that this shipment had to be shipped by a certain date?

A. I don't know.

Q. You don't know, or no?

A. I don't know.

Q. Okay. Do you have any documents in your file which would show that the consignee, or the alleged consignee, Elgie, requested this shipment by a certain date?

A. I don't know.

Q. You don't know? So, based upon this, sir, would it be fair to say that Elgie never required these specific shipments by a specific date or on a specific vessel, is that correct?

A. One more time, sir.

Q. Would it be fair to say, sir, that Elgie Company never gave instructions that this shipment was to be carried on a specific vessel, is that correct?

MR. KOCHENDORFER: If you know.

THE WITNESS: I really don't know.

BY MR. DALEY:

Q. You don't know? But do you have any documents which would show that they wanted it on a specific vessel, carried on a specific vessel and arrived by a certain date?

A. Not to my knowledge.

Q. Are you still doing business with Elgie & Company?

A. Yes.

Q. You are? Now, sir, this invoice that was marked as Plaintiff's Exhibit No. 3, does that have the same type of machine as was shipped on the S. A. Nederburg?

A. Precisely.

Q. It does?

A. That's the name of the ship.

Q. And what is the price on that invoice, sir, for this specific generator?

A. This is the replacement machine, the price is Ninety Five Hundred Thirty Seven Dollars.

Q. And the date of that invoice?

A. October 17th, '74.

Q. So that's approximately seven months after the specific goods that are in this action, that's about seven months after the date that these goods were received in New York, is that correct?

A. I don't know.

MR. VALBY: He testified earlier he doesn't know when they were received in New

York.

THE WITNESS: I don't know.

MR. DALEY: I believe we showed him the dock receipt before that said March 3, '74.

MR. VALBY: That's what it's based on then, not his personal knowledge.

BY MR. DALEY:

Q. It's approximately seven months after?

A. Right.

Q. And the value of the machine went up?

A. Yes. The price of the machine went up.

Q. Do you know what the price of the machine was in April of 1974?

A. Yes. Nine Thousand Five Hundred Thirty Seven Dollars.

Q. In other words, from December to April it's this price now? How do you know that?

A. Shuron customarily raises prices at the end of each calendar year. December of '73 they --

Q. So, in effect this consignee got a bargain by ordering in December of 1973?

A. Depends how you look at it.

Q. I mean, they save some money?

A. Not necessarily. That's when he ordered it.

MR. VALBY: Don't answer that question, it's an irrelevant question whether he got a bargain or not.

BY MR. DALEY:

Q. Do you have any contracts with anybody in April or May of '74 which would show the invoice value for this generator?

A. What do you mean by "anybody"? Any customer at all?

Q. Any customer for this same generator.

A. I'm sure we do.

Q. Do you have them with you?

A. No.

Q. Do you of your own personal knowledge know that the price was raised as of January, 1974?

A. No.

Q. Do you know of your own --

A. I can't say January, '74, I know it went through, I don't know the exact date.

Q. Could have been April or May of '74?

A. No, it was the end of the calendar year, that's company custom.

Q. But do you know if that custom was in effect?

A. Yes.

Q. You do? And you can tell me the price and everything -- on everything that the company imports?

MR. VALBY: I don't understand.

BY MR. DALBY:

Q. Does the company make an across the board increase in cost? I mean, is everything increased in cost at the end of a year?

A. Company custom usually indicates that if there's a price increase, all prices are increased. We don't usually practice selective pricing.

Q. You don't?

A. No.

Q. You don't go on the market situation of supply and demand?

A. No.

Q. Do you still use Copeland Shipping Company, or Shipping, Inc.?

A. Occasionally.

Q. Occasionally? Are there other people you use?

A. I should not say "occasionally", frequently.

Q. And you still use them?

A. Yes.

Q. Is a letter of credit posted in a bank, irrevocable letter of credit? You testified before you present documents to the bank and somebody gets paid for those documents?

A. Yes.

Q. Who gets paid? Immediately.

A. Now or then?

Q. I'm talking about then.

A. I have no idea what happened then.

Q. Okay, sir. I show you the first invoice -- I mean first telex which was marked Third Party Defendant Exhibit A. Does that refer to any invoice number?

A. Yes.

Q. Okay. What is that invoice number?

A. 373984.

Q. Is that the same as this invoice number? I'm specifically referring to page 8 of Plaintiff's Exhibit No. 1, for identification. Could you read me the invoice number on page 8?

A. 373985.

Q. Is that the same number on the telex?

A. No.

Q. Do you have an invoice number in there the same as the one on that telex?

A. Yes.

Q. And what is that for? What specific type of product is it?

A. Oh, excuse me, it is not the same, I beg your pardon. Wait a second. Yes, there is one.

Q. What is that?

A. That is a very long series of sub-assemblies and parts, machinery parts that go along -- go along with this machine.

Q. And how was that packed, if you know?

A. I have no idea.

Q. Could it be in a crate?

A. Yes.

Q. Good. And what was the value of that? Were these all packed in one crate?

MR. VALBY: All the items on that invoice?

BY MR. DALEY:

Q. That's correct. I'm talking of specifically page two of --

A. You can't tell from the invoice, the invoice is part of the entire shipment.

Q. So it's possible that more than one crate would be used to pack that shipment, is that correct? Talking specifically in reference to invoice no. 373984.

A. It's possible that all of these goods were in more than one container, right.

Q. Now, what is the total value of the goods packed in or invoiced under invoice no. 373984?

A. Two Five Two Zero.

Q. Two Five Two Zero? Is that Two Thousand Five Hundred Twenty Dollars?

A. Right. Point Two Zero, right.

Q. And that was supposed to be -- was that also part of this shipment that was supposed to be shipped on the S. A. Nederburg?

A. The telex reads, "In reference to our phone call, shipping No. 31101, our invoice 373984, shipment No. 287M included with other large machinery shipment on S. A. Nederburg. Regards, Larner."

Q. Now, does that telex only involve invoice 37 -- or, does that only specifically involve invoice 373984?

A. No, the telex is in reference to the entire shipment.

Q. The entire shipment, is that right?

A. Right.

Q. Now, I show you this telex, and this is dated May 20th,

1974. Okay. Could you please read that telex?

A. The telex is to Elgie from Larner, at the time my predecessor, "Copeland Shipping confirms eleven cartons one crate", I don't know, there's a letter "O", must have been a typo, "Nederburg Ex New York 15 March. I suggest you advise Steamship Line to locate missing cases otherwise you must initiate an insurance claim." Signed "Larner Shurcon", which is our signature on the telex.

Q. That states "missing cases"?

A. Yes.

Q. That's plural, isn't it?

A. That's what it says.

Q. And you don't -- do you know specifically what cases they are referring to as missing?

A. I know only after getting involved in the replacement.

Q. I'm not asking that, I'm asking -- it says "cases", is that correct?

A. Yes.

Q. Now, do you specifically know what cases they are referring to?

A. No.

MR. VALBY: Do you know now?

MR. DALBY: I'm not -- wait a second. I believe I'm the one conducting the cross-examination of this witness. While you are here to represent their interests, I do not believe it's proper to interject your own questions. I'm conducting the cross-examination.

MR. VALBY: Well, my question would clarify, in the interest of my client, the question you've asked.

MR. DALBY: The question that I know you are going to ask, did they order another generator, and the witness has already testified yes, but the witness also testified that he doesn't know if in prior years and prior to this shipment whether or not they could have ordered more than one generator of the same type. Isn't that correct?

THE WITNESS: I don't know.

MR. VALBY: Let me clarify one thing, did you know at the time you received this telex, or rather, as of the date of this telex, did you know what missing cases were referred to? At that time did you personally know?

THE WITNESS: No.

MR. DALEY: First of all, did he receive this telex?

THE WITNESS: No.

MR. VALBY: I said at the date of this telex.

BY MR. DALEY:

Q. Who received this telex?

A. Mr. Elgie. The telegram is addressed to Mr. Elgie.

Q. To Mr. Elgie?

A. From Larner representing Shuron.

Q. Now, this is from Mr. Elgie, and I imagine he's trying to find out what happened, right?

A. Right.

Q. Is there any telex responding to this?

A. No. This is from Larner.

Q. That's what I meant.

A. That isn't what you said. Responding to Mr. Elgie's inquiry as to "where is my machine?".

Q. Doesn't say "machine", does it?

A. That's right.

Q. What does it say?

A. "Missing cases".

Q. Doesn't say anything about a machine, as a matter of fact, does it?

A. Only in referring to one crate.

Q. It says a missing crate?

A. No, it says "eleven cartons and one crate", that's in reference to the machine.

Q. But as far as the missing article, he said "missing cases", is that correct?

A. That's what the telex says.

Q. Okay. Did your company arrange for the insurance of this shipment?

A. No.

Q. Do you know who did?

A. No.

Q. Did you receive any proceeds of insurance?

A. No.

Q. Did you get a rebate from Elgie & Company?

A. Got paid by Elgie & Company.

Q. Did you have to give a rebate to Elgie & Company because of the failure to deliver any part of the shipment?

A. No.

Q. I show you this telex, and that's dated --

A. July 1.

Q. -- July 1st, 1974?

A. Yes.

Q. Could you read that?

A. The telex is addressed to Elgie & Company, and again signed by Larner who is representing Shuron. "Original and duplicate insurance certificate #OC-1046 for $25,650 with all documents to Barclays Bank, Commercial Insurance Co., Newark, New Jersey, Sub-Agent Rennie Murray and Co., Durban, Copeland is tracing shipment from NYC", which I assume is New York City.

Q. It says "shipment", is that correct?

A. "Copeland is tracing shipment".

Q. Would that include the whole shipment?

A. That would include everything.

Q. So Copeland, in July 1st, 1974, Copeland does not appear to know what vessel the shipment went on, is that correct?

A. I don't know. I don't draw that conclusion.

Q. And who are the agents from South Africa, if you can tell from that telex?

A. I would guess that it's Rennie Murray.

Q. And do you know what their duties are?

A. I have no idea.

Q. You don't have any idea?

A. No.

Q. Have you, since March of -- or, since July of 1974, have you had any further telexes between yourself and Elgie & Company relating to this shipment?

A. Relating to this incident?

Q. Relating to this shipment, yes, this incident.

A. Yes. Not necessarily in the form of telexes, but yes.

Q. Do you have copies of those?

A. Here. You want to read this first? There's three of them.

MR. DALEY: Off the record.

(Discussion off the record.)

MR. DALEY: I'll have this marked as Third Party Defendant Shambo Exhibit E.

(Whereupon, Third Party Defendant Shambo Exhibit E was then received and marked for identification.)

BY MR. DALEY:

Q. Okay. Have you ever had any problems with Elgie & Company regarding shipments?

A. No.

Q. None whatsoever?

A. No.

Q. Have they ever complained about how you packed shipments?

A. Yes.

Q. Have they ever complained that you put the wrong articles in the wrong crate?

A. No.

Q. They haven't?

A. I don't think so.

Q. I show you page 2 of Defendant Shambo Exhibit E and ask that you read the first paragraph.

(Witness reading.)

THE WITNESS: How many questions am I answering?

MR. VALBY: Read the paragraph.

THE WITNESS: "Also please make certain that the invoices are accurate in every detail as we have been put to considerable inconvenience by mistakes - for example: - invoice 31560 stated that the laps on it would be shipped in two triwall cartons when in fact they were shipped in eight."

BY MR. DALEY:

Q. So apparently there has been complaints about the packing of the invoice?

A. That's complaints about invoicing error.

Q. Does your invoice state how many packages are used on each specific invoice? In other words, take the second page of Plaintiff's Exhibit No. 1, invoice No. 373984, all right? Does that say how many packages? You know, how --

A. Yes.

Q. It does?

A. Yes.

Q. And that is what your company says is in eight crates, is that right, or whatever?

A. I don't know.

Q. Now, this letter from Elgis & Company, I imagine they receive a copy of your invoice, isn't that correct?

A. Hopefully.

Q. Now, wouldn't you say from reading that first paragraph that there's a complaint --

MR. VALBY: The letter speaks for itself.

MR. DALEY: I'm not asking for him to interpret the letter, I'm just asking is that a complaint? Because there's a difference in the numbers of packages on the invoice and the number of packages received?

MR. VALBY: Don't answer the question. The letter speaks for itself.

BY MR. DALEY:

Q. I'm reserving all my rights with reference to the witness failing to answer any questions. All right? Now, sir, I show you the first paragraph -- no, strike that. Okay, sir, I ask you to read from here, and the paragraph that is numbered No. 1 on Third Party

Defendant Exhibit E.

A. "The generator has disappeared, and we are having the greatest difficulty getting the insurers, Commercial Insurance Co. of Newark, N. J., to admit liability so that we can order another. Please will you contact them urgently and press for a settlement."

Q. Did you contact Commercial?

A. I called Commercial Union --

MR. VALBY: Commercial Insurance.

THE WITNESS: Excuse me, Commercial Insurance Co., only to see if unofficially I could expedite things on behalf of Mr. Elgie. Do you want the second paragraph?

BY MR. DALEY:

Q. No. He said it disappeared?

A. He said it disappeared.

Q. Do you know where it disappeared?

A. No idea.

Q. Now, sir, I ask you if the second paragraph -- now, this was received by you?

A. Yes. The paragraph marked No. 2?

Q. Yes. Could you read that, please?

A. "The enclosed list gives the items which have not yet been shipped, and which we require urgently as we are able to do some of the work with the hand surfacer. Please will you ensure that these are shipped as soon as possible."

Q. Does that have anything to do with the items on the invoice marked Plaintiff's Exhibit No. 1?

A. It has something to do with some of the items on the series of invoices regarding the entire shipment, yes.

Q. And the complaint by Elgie & Company was some of them may not have been shipped, is that correct?

A. That's what the letter says, right.

Q. So in effect, sir, that invoice that you have, Plaintiff's Exhibit No. 1, with eight or ten pages, you billed Elgie & Company for the total amount of that invoice, is that correct?

A. I would like to backtrack here a little bit. The complaint is referring to items on the entire order. There were items backordered against the original order which is No. -- something. The only invoice -- we only invoice for goods shipped, not backordered. He's referring to laps, which is a grinding tool which took us months and months and months to ship him because the order is so large.

Q. Are there any laps in there?

A. Yes.

Q. Do you know if he received the laps he was supposed to have received?

A. I can only assume.

Q. Do you know?

A. No.

Q. And you don't know what was involved in each specific crate?

A. No. That's right.

Q. Do you have any document in your file which would show the number of the specific crates which Elgie & Company did not receive?

MR. VALBY: Off the record.

(Discussion off the record.)

THE WITNESS: The answer is yes.

BY MR. DALEY:

Q. Do you have documents in your file to show which specific crate or case is not received by Elgie & Company?

A. Yes.

Q. You have a document? May I please see that document?

A. Give me my letter back. Mr. Elgie, in his letter of August 21st to me, and the telexes refers to the missing generator. We only ship generators in crates, only one crate shipped in the shipment.

Q. Okay.

A. What do you want to know?

Q. Now, in relation to this generator, I'm talking about a delivery in South Africa now, do you know if the crate was ever discharged from the S. A. Nederburg? Talking about just specifically the crate.

A. No idea whatsoever.

Q. Do you know anything about what was discharged from the S. A. Nederburg?

A. No.

Q. You don't?

MR. VALBY: Of your personal knowledge?

THE WITNESS: I have no idea.

BY MR. DALEY:

Q. That's implied. So is it possible that this crate was lost on the dock in South Africa?

A. I don't know.

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Q. Is it possible, I said.

MR. KOCHENDORFER: Anything is possible.

MR. DALEY: You'll stipulate for the record it's possible then?

MR. KOCHENDORFER: I don't think it's possible for this one, no. There's no proof it was loaded, and the fact is the steamship company already acknowledged that this was not discharged from the ship. I think if they saw fit to attend this deposition, they have already admitted that the one crate was not discharged from the S. A. Nederburg, and I think the discussion about what happened afterwards is --

MR. DALEY: I'm going to take exception to your statement, I don't think it's proper for you to make a statement on behalf of the steamship company, who, as you said, is not here.

MR. KOCHENDORFER: They stated under oath, I have a copy of their Answers to Interrogatories and they stated it was not discharged from the vessel.

MR. DALEY: All right. That's fine. Doesn't mean it wasn't loaded. I have no further questions at this time.

RE-EXAMINATION BY MR. KOCHENDORFER:

Q. Just a couple questions on followup on this. For the record, there has been some confusion here as to cases, crates, and cartons. Are the parts on the invoice which we've set forth as Plaintiff's Exhibit No. 1 shipped in the same type of packing as the generator which we are discussing?

A. No.

Q. How do you ship a generator?

A. In a wooden crate.

Q. Would there be any confusion between that crate and the other items that you are shipping?

A. Absolutely none.

Q. And do your records reflect that the shipment from Florida included one crate containing a generator?

A. Yes.

Q. And do all the items in the letters and documents that you have here with reference to discrepancies relate to part numbers which might or might not have been included in an order?

MR. VALBY: I'm not sure I understand.

THE WITNESS: Going to have to give me that one more time.

BY MR. KOCHENDORFER:

Q. Do the items you were being cross-examined about, such as laps and items shipped in Triwall Cartons, were they parts or were they machinery?

A. They were parts.

Q. So that actually then the items that you were discussing earlier on cross-examination as to the discrepancies between the order and the invoice were not the generator?

MR. DALEY: I'm going to object to the form of the question.

BY MR. KOCHENDORFER:

Q. All right, you can answer anyhow.

A. No.

Q. They were not the generator?

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A. No.

Q. All right. Did you ever receive any information from Elgie & Company that they had subsequently received the generator which was shipped under the first shipment?

A. No.

MR. KOCHENDORFER: That's it.

RE-EXAMINATION BY MR. DALEY:

Q. Just a couple more. Do you ship anything else in crates besides generators?

A. Just a minute, please.

MR. VALBY: Off the record.

(Discussion off the record.)

THE WITNESS: I don't know then.

BY MR. DALEY:

Q. Now do you ship anything else in crates?

A. Now, yes.

Q. What do you ship in crates now?

A. Other types of generators.

Q. So, in other words, you only ship generators in crates?

A. No, other heavy machines in crates, also.

Q. Other heavy machines?

A. All other machines.

Q. But I mean basically what you ship in crates are machines?

A. Yes.

Q. Okay. Just to clarify a couple things in my own mind, you testified you weren't in Tampa when this crate was packed?

A. Correct.

Q. You don't know what went into the crate of your own personal knowledge?

A. Correct.

MR. DALEY: I have no further questions.

* * * * *

CERTIFICATE

I, ROBERT J. KANE, do hereby certify that I did record in machine shorthand the foregoing proceedings held in the above-entitled matter at the time and place hereinbefore set forth, and I do further certify that the foregoing transcript, consisting of sixty-three (63) typewritten pages is a true and correct transcript of my said stenographic notes.

Robert J. Kane
Notary Public

J 5528

SHUCON CONTINENTAL
A Textron COMPANY
P. O. BOX 331 • ROCHESTER, NEW YORK 14601 • U. S. A.

ELGIE & COMPANY
P O BOX 1899
54-55 GARDINER STREET
DURBAN SOUTH AFRICA
00000

SHIPPED TO

CUST. CODE			SHIPPING NO.	INVOICE NO.	INVOICE DATE
2204	59016	OCEAN FGT	3131104	373987	DEC 07,1973

PART NO.	ORDER NO.	DESCRIPTION	PRICE DIVISION	U/M	QTY	PRICE	AMOUNT
0050281	11278	281-A RECLAIM TANK SER NO 981		EA	1.0	209.00	209.00
0000000	11278	EXT CHG EXPORT CRATE 2 CRATE L 29 1/2 W 22 H 27 1/2 WITH 31 31101 SHIP NO 287M					5.00
					1.0		214.00

SHUCON/CONTINENTAL
Division of Textron, Inc.
P. O. Box 331
Rochester, New York 14601
U. S. A. Susan M Ford

1 crate on one

We certify that this Invoice is
correct, and that these goods
are the pr[illegible] [illegible]

Sold by Textron DISC Inc.
a commission agent

RECEIVED

[illegible] Ex. [illegible] for [illegible]

LICATE INVOICE

J 553a

SHURON CONTINENTAL
A textron COMPANY
P. O. BOX 331 • ROCHESTER, NEW YORK, 146[illegible] • U. S. A.

BILLED TO
ELGIE & COMPANY
P O BOX 1899
54-55 GARDINER STREET
DURBAN SOUTH AFRICA
00000

SHIPPED TO

CUST. CODE		SHIPPING NO	INVOICE NO.	INVOICE DATE
22[illegible] 9016	OCEAN FREIGHT COPELAND	3131101	373984	DEC 07,1973

PART NO	ORDER NO	DESCRIPTION PRICE DIVISION	U/M	QTY	PRICE	AMOUNT
0010579	11278	[illegible] DIAMOND 3 1/2 SA NO SC 3134	EA	1.0	317.76	317.76
X0009227	11278	STORAGE BOX COMPLETE	EA	1.0	155.23	155.23
0009160	11278	BAR 136 DEGREE ALLOY	LB	42.0	13.87	582.54
X0003642	11278	ADAPTOR HIGH CURVE SA	EA	1.0	71.46	71.46
0009293	11278	BLOCK REMOVAL OPM	EA	1.0	6.30	6.30
0010389	11278	ADAPTOR AXIS CORR SA	EA	1.0	20.80	20.80
0010390	11278	GAGE AXIS SETTING SA	EA	1.0	22.22	22.22
0051801	11278	1600B RACK WITH GAUGES	EA	1.0	282.08	282.08
0010880	11278	ERECTA RACK LARGE	EA	2.0	92.48	184.96
X0249001	11278	LAP 2490- 1 PLANO PLANO	EA	20.0	1.57	31.40
X0249023	11278	LAP 2490-23 -4 00 -6 CO	EA	30.0	1.57	47.10
0010986	11278	BLUE WORK TRAY	EA	40.0	1.10	44.00
0010987	11278	YELLOW WORK TRAY	EA	40.0	1.10	44.00
0010988	11278	GREEN WORK TRAY	EA	40.0	1.10	44.00
0010989	11278	ORANGE WORK TRAY	EA	40.0	1.10	44.00
0010990	11278	RED WORK TRAY	EA	40.0	1.10	44.00
[redacted]	[redacted]			[redacted]		[redacted]
0000000	11278	PELLON PADS 2 1/2X3		2000.0		55.00
0000000	11278	PELLON PADS 4 IN		1000.0		63.50
0051060	11278	C3 PLASTIC PROTRACTOR	EA	3.0	.36	1.08
0051028	11278	LENS MEASURE	EA	3.0	21.28	63.84
0007167	11278	CALIPER	EA	3.0	4.36	13.08
0007192	11278	RULE CELLULOID	EA	6.0	.26	1.56
0013960	11278	WORK TICKET PADS	EA	10.0	.32	3.20
0010127	11278	CL-RITE CERIUM OXIDE50	DR	2.0	86.70	173.40
0013001	11278	SHUR-FINE NO 175	EA	2.0	33.10	66.20
0013000	11278	SHUR-FINE 145 50LBS	DR	2.0	35.20	70.40
0002790	11278	POINT SPINDLE	EA	10.0	.68	6.80
0006329	11278	PIN LENSBODY CENTERING	EA	50.0	.21	10.50
0008539	11278	O RING 1 11/16 X 1 7/8	EA	4.0	.42	1.68
0009189	11278	O RING NOZZLE	EA	4.0	.15	.60
0009118	11278	BULB LIGHT	EA	2.0	.42	.84
0002970	11278	TOOL CUTTING	EA	12.0	2.73	32.76
0006615	11278	LAMP ELEC	EA	1.0	.47	.47
X 0008329	11278	PLUNGER LOCATING	EA	4.0	3.36	13.44
		1 CRATE L 13 W 9 H 12 2 CRATES L 31 1/2 W 36 1/2 HT 30 1/2 WT 1012 SHIP NO 287M				
				TOTAL QUANTITY 2439.0	TOTAL	2520.20

Sold by Textron DISC Inc as commission agent

ORIGINAL INVOICE

SHURON/CONTINENTAL
Division of Textron, Inc.
P. O. Box 331
Rochester, New York 14601
U. S. A.

We certify that this Invoice Is correct, and that these goods [illegible] the [illegible] U. S. A.

J 5542

SHURON CONTINENTAL
A TEXTRON COMPANY
P. O. BOX 331 • ROCHESTER, NEW YORK, 14601 • U. S. A.

BILLED TO
ELGIE & COMPANY
P O BOX 1899
54-55 GARDINER STREET
DURBAN SOUTH AFRICA
00000

SHIPPED TO

CUST. CODE			SHIPPING NO.	INVOICE NO.	INVOICE DATE
2204	59016	OCEAN FGT	3131107	379421	DEC 14,1973

PART NO.	ORDER NO.	DESCRIPTION PRICE DIVISION	U/M	QTY.	PRICE	AMOUNT
0050108	11278	88-D 230V-50 CY MECH SER NOS 4520 4523 4522	EA	3.0	1102.00	3306.00
0000000	11278	EXT CHG EXPORT CRATE				33.00
0000000	11278	EXT CHG CYCLE CONV 3 CRATES L 36 1/2 W 31 1/2 H 30 1/2 TOT WT 888 SHIP NO 289M				30.00
				TOTAL QUANTITY	TOTAL	

3 [illegible]

RECEIVED
2[illegible] APR 1974

MOORE BUSINESS FORMS, INC.

J 555a

SHURON CONTINENTAL
A Textron COMPANY
P. O. BOX 331 • ROCHESTER, NEW YORK, 14601 • U. S. A.

BILLED TO
ELGIE & COMPANY
P O BOX 1899
54-55 GARDINER STREET
DURBAN SOUTH AFRICA
00000

SHIPPED TO

CUST. CODE			SHIPPING NO.	INVOICE NO.	INVOICE DATE
2204	59016	*ocean fgt*	3131109	373991	DEC 07,1973

PART NO.	ORDER NO.	DESCRIPTION	QTY	PRICE	AMOUNT
0050254	11278	252A MACHINE 230V 60CY EA	2.0	1045.00	2090.00
		SER NOS 2028 2029			
0000000	11278	EXT CHG EXPORT CRATE			22.00
0000000	11278	EXT CHG CYCLE CONV			12.00
		2 CRATES			
		L 31 1/2			
		W 36 1/2			
		H 30 1/2			
		TOT WT 620			
		SHIP NO 291M			
			2.0		2124.00

SHURON/CONTINENTAL
Division of Textron Inc.
P. O. Box 331
Rochester, New York 14601
U. S. A.
Susan M Ford

2 cartons

We certify that this invoice is correct, and that these goods are the product of the U.S.A

RECEIVED
2

[illegible] Inc.
Commission Agent

DUPLICATE INVOICE

J 556a

SHURON CONTINENTAL
A Textron COMPANY

P. O. BOX 331 • ROCHESTER, NEW YORK, 14601 • U. S. A.

BILLED TO
ELGIE & COMPANY
P O BOX 1899
54-55 GARDINER STREET
DURBAN SOUTH AFRICA
00000

SHIPPED TO

CUST. CODE			SHIPPING NO.	INVOICE NO.	INVOICE DATE
2204	59016	OCEAN FGT	3131106	373989	DEC 07,1973

PART NO	ORDER NO	DESCRIPTION	PRICE DIVISION	U/M	QTY	PRICE	AMOUNT
0050035	11278	108 LAP CUTTER 230V 50C		EA	1.0	2538.00	2538.00
		SER NO 1872					
0000000	11278	EXT CHG EXPORT CRATE					15.00
0000000	11278	EXT CHG CYCLE CONV					4.00
		1 CRATE					
		L 31 1/2					
		W 36 1/2					
		HT 30 1/2					
		WT 380					
		SHIP NO 288M					

SHURON/CONTINENTAL
Division of Textron Inc.
P. O. Box 331
Rochester, New York 14601
U. S. A.

Susan M Ford

We certify that this invoice is correct, and that these goods are the product of the U. S. A.

RECEIVED

Sold by Textron DISC Inc.
as commission agent

DUPLICATE INVOICE

	QTY		
	1.0	TOTAL	2557.00

J 557a

SHU[illegible]N CONTINENTAL
A Textron COMPANY
P. O. BOX 331 • ROCHESTER, NEW YORK, 14601 • U. S. A.

BILLED TO
ELGIE & COMPANY
P O BOX 1899
54-55 GARDINER STREET
DURBAN SOUTH AFRICA
00000

SHIPPED TO

CUST. CODE				INVOICE NO.	INVOICE DATE
2204	59016	OCEAN FGT	SHIPPING NO. — 3131105	373988	DEC 07,1973

PART NO	ORDER NO	DESCRIPTION	PRICE DIVISION	U/M	QTY	PRICE	AMOUNT
0050149	11278	149-B LENS MARKER SER NO 883 WITH 31 31101 SHIP NO 287M 1 CRATE L 31 W 7 H 73 WITH 281A		EA	1.0	344.00	344.00
					1.0	TOTAL	344.00

SHURON/CONTINENTAL
Division of Textron, Inc.
P. O. Box 331
Rochester, New York 14601
U. S. A.

Susan M Ford

1 [illegible]

We certify that this invoice is correct, and [illegible] are the prod[illegible]

RECEIVED
2[illegible] APR 1974

Sold by Textron DISC Inc.
as commission agent

DUPLICATE INVOICE

J 5582

SHURON CONTINENTAL
A Textron COMPANY

P. O. BOX 331 • ROCHESTER, NEW YORK, 14601 • U. S. A.

BILLED TO
ELGIE & COMPANY
P O BOX 1899
54-55 GARDINER STREET
DURBAN SOUTH AFRICA
00000

SHIPPED TO

CUST. CODE			SHIPPING NO.	INVOICE NO.	INVOICE DATE
Z204	59016	OCEAN FGT	3131103	373986	DEC 07,1973

PART NO	ORDER NO	DESCRIPTION PRICE DIVISION	U.M.	QTY	PRICE	AMOUNT
0050181	11278	181-8 BLOCKING DEVICE	EA	1.0	1150.00	1150.00
		SER NO 1269				
0000000	11278	EXT CHG EXPORT CRATING				5.00
0004238	11278	VALVE & STEM SA	EA	1.0	6.77	6.77
0006529	11278	PIN LENSBODY CENTERING	EA	50.0	.21	10.50
0009103	11278	ADAPTOR SPHERE SA	EA	4.0	2.68	10.72
0009200	11278	ADAPTOR LMPA SPHERE SA	EA	4.0	3.62	14.48
0009205	11278	TUBE WATER	EA	1.0	2.25	2.25
0009214	11278	CHART ULTEX PRISM	EA	1.0	.15	.15
0009215	11278	CUP ALLOY TRANSFER	EA	1.0	.47	.47
0009221	11278	PAD PRESSURE	EA	1.0	3.94	3.94
0009118	11278	BULB LIGHT	EA	1.0	.42	.42
0009290	11278	RING DEBLOCKING	EA	1.0	3.41	3.41
0009427	11278	HANDLE ELL	EA	1.0	3.25	3.25
0009429	11278	SOCKET 11/16	EA	1.0	3.25	3.25
0009430	11278	WRENCH	EA	1.0	3.10	3.10
0009443	11278	X ADAPTOR CUT LENS	EA	1.0	2.31	2.31
0009226	11278	LENS COATING GLASS SA	EA	1.0	2.25	2.25
0009265	11278	PULLER PISTON	EA	1.0	1.57	1.57
0009237	11278	CAN BRUSH TOP 1/2 PINT	EA	1.0	4.30	4.30
0009189	11278	O RING NOZZLE	EA	1.0	.15	.15
		1 CRATE				
		L 19				
		W 13				
		H 22				
		WT 50				
		SHIP NO 290M				
				74.0	TOTAL	1228.29

1 [illegible]

SHURON/CONTINENTAL
Division of Textron, Inc.
P. O. Box 331
Rochester, New York 14601
U. S. A.

Susan M Ford

We certify that this Invoice is correct, and th[illegible] are the produ[illegible]

RECEIVED

DUPLICATE INVOICE

J 559a

SHURON CONTINENTAL
A Textron COMPANY
P. O. BOX 331 • ROCHESTER, NEW YORK, 14601 • U. S. A.

BILLED TO
ELGIL & COMPANY
P O BOX 1899
34-35 GARDINER STREET
DURBAN SOUTH AFRICA
00000

SHIPPED TO

CUST. CODE			SHIPPING NO.	INVOICE NO.	INVOICE DATE
120 9016		OCEAN FGT	3131102	373965	DEC 07,1973

PART NO	ORDER NO	DESCRIPTION	U/M	QTY	PRICE	AMOUNT
0051397	11278	390-C GEN 50CY GLASS	EA	1.0	8670.00	8670.00
		SER NO 1627				
0000000	11278	EXT CHG EXPORT CRATE				150.00
0000000	11278	EXT CHG CYCLE CONV				50.00
0050382	11278	381-A 50CY UNIT	EA	1.0	371.00	371.00
		SER NO T168				
0000000	11278	EXT CHG CYCLE CONV				30.00
	X	NO T168				
		H 64 1/2				
		L 55 3/4				
		W 55 3/4				
		WT 1320				
		SHIP NO 286M				
				2.0	TOTAL	9271.00

224

SHURON/CONTINENTAL
Division of Textron Inc.
P. O. Box 331
Rochester, New York 14601
U. S. A.

We certify that this Invoice is correct, and that these goods are the product of U. S. A.

Missing

DOEANE-CUSTOMS
1 MEI 1974
30
DURBAN

RECEIVED

Sold by Textron DISC Inc.
as commission agent

ORIGINAL INVOICE

J 5602

SHURON CONTINENTAL
A Textron COMPANY

P. O. BOX 331 • ROCHESTER, NEW YORK, 14601 • U. S. A.

BILLED TO
ELGIE & COMPANY
P O BOX 1899
34-59 GARDINER STREET
DURBAN SOUTH AFRICA
00000

SHIPPED TO

CUST. CODE			SHIPPING NO.	INVOICE NO.	INVOICE DATE
2204	9016	OCEAN FGT - NYC	3131137	25844	JAN 25, 1974

PART NO.	ORDER NO.	DESCRIPTION / PRICE DIVISION	QTY.	PRICE	AMOUNT
00501114	11278	8E-D 230V-60 CY MECH	1	XXXXXXXXXXX	XXXXXXXXX ✓
		SER NOS 4430 4442 4525	1.0	1102.00	1102.00 ✓
0000000	11278	EXTRA CHG EXPORT CRATE			11.00XXXXX
0000000	11278	EXTRA CHG CYCLE CONV			XXXXX
		SHIP NO 403M			10.00
		900 LBS	1 INVOICE	373987	214.00
		L 31 1/4 W 39 1/4	1 INVOICE	373988	344.00
		H 30 1/4	INVOICE	373985	9271.00 ✓
			1 INVOICE	373989	2557.00
			3 INVOICE	379421	3369.00
			1 INVOICE	373986	1228.29
			2 INVOICE	373991	2124.00
			OCEAN FREIGHT		1899.29
			INLAND FREIGHT		895.02
			INSURANCE		162.52
			FORWARDING		56.00
			C.I.F. DURBAN		$23,244.12

SHURON/CONTINENTAL
Division of Textron, Inc.
P. O. Box 331
Rochester, New York 14601
U. S. A.

Susan M Ford

1 carton

RECEIVED
26 APR 1974

We certify that this invoice is correct, and that these goods are the product of the U. S. A.

Sold by Textron DISC Inc.
as commission agent

TOTAL QUANTITY		TOTAL	
	3		$23,027.89 XXXXXXX

DUPLICATE INVOICE

J 5612

SOUTH AFRICAN MARINE CORPORATION (N.Y.), as Agents

SHIPPER/EXPORTER

SHERRON CONTINENTAL
40 HUMBOLDT ST.
ROCHESTER, NEW YORK

CONSIGNEE

ORDER OF SHIPPER

NOTIFY PARTY

ELGIE & COMPANY
P.O. BOX 1899
DURBAN

PIER

BKLYN ARMY TERMINAL

EXPORTING CARRIER (Vessel and Flag)

SO. AFR. MORGENSTER

S.A. NEDERBURG

PORT OF LOADING

NEW YORK

PORT OF DISCHARGE

DURBAN

FOR TRANSSHIPMENT TO

DOCUMENT NO.

EXPORT REFERENCES

FORWARDING AGENT, REFERENCES

COPELAND SHIPPING INC. 11321-02
SUBSIDIARY: JET AIR FREIGHT — FMC #1095 — FMC #92
JAMAICA, N.Y. 11422 (212) 241-22

POINT AND COUNTRY OF ORIGIN

DOMESTIC ROUTING/EXPORT INSTRUCTIONS

RECEIVED ON [illegible]

MAR 27 1974

ONWARD INLAND ROUTING

PER

Spaces above are for shippers' memoranda—not part of bill of lading

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
ELGIE & COMPANY PO BOX 1899 54-55 GARDINER ST DURBAN SOUTH AFRICA	11 1	TW.CTNS: } OPTICAL MACHINERY & CRATE: } ACCESSORIES.	RECEIVED 2 [illegible] 74 4512	381
403M, 291M, 290M 289M, 288M, 287M 286M,		L/C# FB 1396	Freight Prepaid	
		"FREIGHT PREPAID" ON BOARD	South African Marine [illegible]	
		G-DEST. SOUTH AFRICA		

These Commodities licensed by the U.S. for Ultimate Destination SOUTH AFRICA
Diversion Contrary to U.S. Law Prohibited.

*as identified on the reverse side and referred to herein as "the carrier." Neither South African Marine Corporation (N.Y.), nor any other person, firm or corporation other than the carrier, whether or not its name is stated elsewhere herein, assumes any of the duties, responsibilities and liabilities stated herein as being those of the carrier.

Ship operated for account of:→ CARRIER NO. 1
(See on reverse side)

FREIGHT:
@ per 40 cu. ft. $
@ per 40 cu. ft. $
@ per 2240 lbs. $
@ per 2240 lbs. $
@ $
@ $
TOTAL FREIGHT $

In witness whereof 3 (Three) Bills of Lading, all of the same tenor have been signed, one of which being accomplished the others to stand void.

B/L No.	Month	Day	Year 19
[illegible]	[illegible]	[illegible]	[illegible]

DATED AT PORT OF LOADING SHOWN ABOVE

FOR AND ON BEHALF OF MASTER

By

AS AGENTS ONLY

J 562a

SHURON CONTINENTAL
A Textron COMPANY
P. O. BOX 331 • ROCHESTER, NEW YORK, 14601 • U. S. A.

BILLED TO
ELGIE & COMPANY
P O BOX 1899
54-58 GARDINER STREET
DURBAN SOUTH AFRICA
00000

SHIPPED TO

CUST. CODE				INVOICE NO.	INVOICE DATE
2204	59019	Mercury-NYC Farrell	3151258	315025	OCT 17, 1974

PART NO.	ORDER NO.	DESCRIPTION	PRICE DIVISION	U/M	QTY	PRICE	AMOUNT
0051397	11278	550-D GEN [illegible] CLASS		EA	1.0	9537.00	9537.00
		SER NO 1676					
							50.00
0000000	11278	EXT CHG CYCLE CONV					
0010601	11278	PUMP VACUUM 50 CY SA			1.0	1090.37	1090.37
0008535	11278	CHUCK VACUUM SA		EA	1.0	218.20	218.20
		1 CRATE 2190					
		H 66 1/2 L 55 1/2					
		W 59 1/2					
		SHIP NO 1124M					

SHURON/CONTINENTAL
Division of Textron, Inc.
P. O. Box 331
Rochester, New York 14601
U. S. A.

Susan Ford

We certify [illegible]
correct, and [illegible]
are the [illegible]

Sold by Textron DISC Inc.
as commission agent

3F3E1 3 8-14

ORIGINAL INVOICE

J 563a

Telegram western union

LAUFON RCC

022786C116 1357EDT
ZCZC 001 INTL TELX ROCHESTER N Y 4/26/74
INT ELGIE AND CO
54-55 GARDINER STREET DURBAN (SOUTH AFRICA VIA RCA)
PT
REPHONE SHIPPING NO. 31101 OUR INVOICE 373984 SHIPMENT NO. 287M
INCLUDED WITH OTHER LARGE MACHINERY SHIPMENT ON SA NEDERBURG EX
NYC 15 MARCH TO DURBAN.
REGARDS
LARNER SHURCON RCC
COL 54-55 31101 373984 287 15
NNNN

ACCEPTED
00001
1-PC

0

3rd P. Deft. Shanks Ex A

J 5642

Telegram
western union

RECEIVED
MAY 20
INTERNATIONAL

X

WU ISCS
◆
SHURON ROC

002109A140 0851EDT
ZCZC 001 INTL TDLX ROCHESTER NEW YORK 5/20/74
INT ELGIE AND COMPANY
54-55GARDINER STREET DURBAN (SOUTH AFRICA VIA RCA)
BT
COPELAND SHIPPING CONFIRMS ELEVEN CARTONS ONE CRATE O NEDERBURG
EX NEW YORK 15 MARCH I SUGGEST YOU ADVISE STEAMSHIP LINE TO
LOCATE MISSING CASES OTHERWISE YOU MUST INITIATE AN INSURANCE
CLAIM
- LARNERS SHURCON
COL 15 5/20/74
NNNN

ACCEPTED
00001
1-PC

T

3rd Aly Def ex B

J 5658

Telegram western union

WU INFOMASTER
◆
SHURON ROC

030275C182 1546EDT
ZCZC 001 INTL TDIX ROCHESTER NY 7/1/74
INT ELGIE AND CO
54-55 GARDINER ST DURBAN (SOUTH AFRICA VIA RCA)
BT
ORIGNAL AND DUPLICATE INSURANCE CERTIFICATE #OC-1046 FOR $25,650
WITH ALL DOCUMENTS TO BARCLAYS BANK COMMERCIAL INSURANCE CO
NEWARK NEW JERSEY SUB-AGENT RENNIE MURRAY AND CO DURBAN
COPELAND IS TRACING SHIPMENT FROM NYC
LARNER SHURCON
NNNN

ACCEPTED
00001
1-PC

3rd P. Def Shambo Ex C

J 566a

PAGE 1.

AMOUNT	ITEM	PRICE	ELECTRICS
1	390-D Automatic Toric Lens Generator with 3½" Wheel for cutting GLASS Complete with wheelhead brake motor, Grinding chamber Lid Switch *8451 Grinding chamber Lid Switch *8451 Coolant tank and Pump, Quickset Assembly	$8,870	3 phase 50 cycles
	Plus 1*10979 3½" wheel for Glass to be stocked as a spare.	317	
1	Uni-Block System Complete, consisting of	2,590	
	1. 131-B Blocker with ~~vise block and~~ all Accessories i.e. items 9453 Standard Accessory Kit complete 9227 Storage Box complete		110v. 50 cycles
	2. 40 lbs. 4160 Alloy		
	3. 231-A Reclaim Tank		110v. 50 cycles
	4. 381-A Vacuum Chuck and compressor		220v. 50 cycles
1	149-B Super Bi-Fo Marker * with Spare Bulb	344	110v. 50 cycles
1	10-A Oldfield Lap Cutter complete with Templates and Template fixtures*(~~4 spare set of Templates~~) * Plus 1 dozen 2970 cutting tools	2,560	220V. 50 cycles
6	83-D Torcyl Cylinder. Surfacers variable speeds and timer	6,750	220v. 50 cycles
	Including 1 EACH 1 3612 Tycurve Attachment	52	
	2 9293 Prism Removal Block	6	
	3 10589 Axis Correction device	20	
	4 10590 Axis setting Gauge	22	

[illegible]

PAGE 2.

AMOUNT	ITEM	PRICE	ELECTRICS
1	484-A Deblocker Complete	$ 89	
2	252-A Sphere Surfacers complete with Timer and abrasive Feed plus 4320 inverted surfacing attachment alloy block Holder	2,130 73	220v. 50 cycles
1	210-C Hand Sphere Surfacer on column with motor	650	220v. 50 cycles
1 #51801	1800 Rack complete with 161 double sided brass gauges	282	
928 laps	48-(1) cylinder laps (finished) 2½" x 3" ± 200D Base to 9.00D Base in 1/4 Dioptres 0.25D to 4.00D cylinder powers in 1/4 Dioptres convex and concave (2) Plano Base	2,350	
96 Laps	0.12 D to 6.00D cylinder power in 1/8 Dioptres concave and convex ±	250	
2	10880 Erecta Rack Cyllap Storage Units	120	
100 #2490	Rough Uncut Laps consisting of 20 Flat 50 Convex to grind concave 30 Concave to grind convex	157	

J 567a

J 568a

PAGE 3.

AMOUNT	ITEM	PRICE	ELECTRICS
2 Sets each of 162	7-A Sphere fining tools Plano to +10.00 in 1/8 Dioptres	$ 884	
1 Set of 76	7-A + 10.25 to +20.00D in 1/4 Dioptres	208	
200 #7196	Job work trays (40 of each of 5 different colours)	220	
See below *	Assorted Emeries compound's Foil or Gauze Pads Pellon Pads Accessories and spare parts i.e. Pins	500	
2000	— Pellon Pads #3480 PSC 2½ x 3 eye pads w/ 110-5 finishing		
1000	— " " " " 4" sphere " w/ 110-5 "		
	MISCELLANEOUS		
3	51060 Bifocal Protractors	$ 1.00	
3	51028 Geneva Lens Measurers	64.00	
3	Pairs of Lens Calipers	21.00	
6	Plain Pd Plastic Rulers	2.50	
10	Generator Job Pads	3.00	

* 2/ #10127 (Feed Drums) Shurium
2/ #15001 Shurfine (Feed Drums)
2/ #13000 " "

10/ #2790 4/ #9189
50/ #6529 2/ #9118
4/ #5529
4/ #8539

Form CRE 83 (S.A.)
12/69

J 569a

RECEIVED
SEP 11 1973
INTERNATIONAL

BARCLAYS BANK D.C.O.

BARCLAYS [illegible] BANK LIMITED
[illegible]
[illegible]
DURBAN, NATAL.
Branch

6th September, '73 Date

IRREVOCABLE CREDIT No.:- FB 1396

BENEFICIARY(IES)	~~ADVISED THROUGH~~
TO:- SHURON CONTINENTAL, 40 HUMBOLDT ST. ROCHESTER, NEW YORK, U.S.A. 14609	
ACCREDITOR(S)	
ELGIE & COMPANY, P.O. BOX 1899, DURBAN.	~~THIS IS A CONFIRMATION OF THE CREDIT ADVISED BY CABLE TODAY THROUGH~~ . . . (Delete where necessary)

Dear Sir(s),

We are pleased to advise that for account of the accreditor(s) we have established an Irrevocable Credit in your favour available by your draft(s) up to an aggregate amount of US $ 32 000,00 (say Thirty two thousand United States Dollars.) drawn upon Barclays Bank International, 120 Broadway, New York, NY 10005

at .... sight for 100 per cent of the C.I.F. invoice value of Optical Machinery/Accessories

to be shipped or consigned from any U.S.A. Port to Durban

not later than 31st December, 1973.

Part shipments ~~allowed~~ not allowed   Transhipment ~~allowed~~ not allowed

Insurance is to be effected by ~~accreditor(s)~~/beneficiary(ies)

Drafts are to be accompanied by:-

Certified Customs Invoices, in triplicate

Full set of clean "On Board" Shipping Company's Bills of Lading to order blank endorsed, marked "Freight Prepaid"

Other documents:-

and, unless insurance is in terms of this Credit to be arranged here by accreditor(s) Marine Insurance Policy or Certificate (in duplicate) endorsed in blank for the invoice value of the goods plus 10 per cent, including Warehouse to Warehouse clause
Institute Cargo Clause (all risks) claims payable in South Africa
and cover against Strikes, Riots and Civil Commotions and War Risks.

Special Instructions (if any):- 1) All bank charges outside South Africa are for the account of the beneficiary.

Drafts drawn hereunder are to be marked "Drawn under Barclays Bank D.C.O., DURBAN FOREIGN branch Irrevocable Credit No.:- FB 1396

All drafts drawn under this Credit must at the time of negotiation be endorsed on the reverse of this form by the negotiating bank and the presentation of any draft shall be a warranty by the negotiating bank that such endorsement has been made. This Credit should be attached to any draft which exhausts the Credit.

We undertake that drafts and documents drawn under and in strict conformity with the terms of this Credit will be duly honoured on presentation if in order.

Unless previously exhausted this Credit shall cease to be available for negotiation of beneficiary's drafts after 7th January, 1974.

Subject to Uniform Customs and Practice for Documentary Credits (1962 Revision). International Chamber of Commerce Brochure No. 222.

Yours faithfully,

Accountant.
(Sig. Book Page/Supp. No.)

Manager.
(Sig. Book Page/Supp. No.)

J 570a

DIRECTIONS TO NEGOTIATING BANK

1. One set of negotiable documents is to be sent by airmail to BARCLAYS NATIONAL BANK LIMITED
FO[illegible]
P.O. B[illegible]
DURBAN, NATAL.
AND REMAINING SETS BY AIRMAIL

2. A certificate that documents have been disposed of as required and that all terms of the credit have been complied with, is to be attached to the First of Exchange.

Where this form is in confirmation of a cable advice, this credit is available only for any amount that has not already been availed of under such cabled advice and may not be availed of at all unless attached to our branch's or correspondent's notification of such cabled advice, the two jointly constituting evidence of the undrawn balance of the credit.

PARTICULARS OF DRAFTS NEGOTIATED UNDER THIS CREDIT:-

Date	Name of Negotiating Bank	Amount in Words	Amount

J 5712

K. O. ELGIE,
F.S.M.C. (ENG.), F.O.A. (S.A.)
M. K. ELGIE,
B.SC. (ST.A.), F.B.O.A. (ENG.)
F.O.A. (S.A.)
P. G. LOXTON,
O.D. (U.S.A.) F.O.A. (S.A.)

Elgie & Co.
REGISTERED OPTOMETRISTS AND
CONTACT LENS PRACTITIONERS
54-55 GARDINER STREET, DURBAN 4001

IN ATTENDANCE:
MORNING 8.30—1.00
AFTERNOON 2.00—4.30
APPOINTMENT
TELEPHONE 20661
P.O. BOX 1899
DURBAN 4000

MKE/AG.

21st August, 1974.

RECEIVED
AUG 29
INTERNATIONAL

Attention Mr. Paul Shambo.

Messrs. Shuron Continental,
P.O. Box 331,
Rochester,
NEW YORK 14601.
U.S.A.

Dear Sir,

I am writing about the order for a lens surfacing workshop which we placed almost a year ago. This was given to Mr. Fred Larner, who assured us that the entire order would be shipped within 120 days, and in anticipation of this we engaged extra staff and rented larger premises.

The situation at present [illegible] as follows:-

1. The generator has [illegible]peared, and we are having the greatest difficulty getting [illegible] insurers, Commercial Insurance Co. of Newark N.J. to admit liability sothat we can order another. Please will you contact them urgently and press for a settlement.

2. The enclosed list gives the items which have not yet been shipped, and which we require urgently as we are able to do some of the work with the hand surfacer. Please will you ensure that these are shipped as soon as possible.

201
648-4108
3000
MOAC
Dan Romano → 212 553
7982
act. #
policy #
who correspondg

2/..........Also please make.........

From: ELGIE & CO.

To : Shuron Continental : U.S.A.

21st August, 1974.

Also please make certain that the invoices are accurate in every detail as we have been put to considerable inconvenience by mistakes - for example :- invoice 31560 stated that the lens on it would be shipped in two TRIWALL CARTONS when in fact they were shipped in eight.

We then had to convince our customs officials that we were not trying to import six cartons without any documents, and this took some doing.

I would be grateful if you will attend to these items as soon as you possibly can.

Yours faithfully,
ELGIE & CO.

M.K. ELGIE.

Enc. 2.

[THIS PAGE LEFT INTENTIONALLY BLANK]

Plaintiff's Exhibit 3

(One Page of Invoice of Shuron Continental Sale to Elgie & Company Reflecting the Generator)

[PHOTOSTAT]

(Opposite) ☞

P-EX No. 3 in FED
3/19/76
G.T

SHURON CONTINENTAL
A Textron COMPANY
P. O. BOX 331 • ROCHESTER, NEW YORK, 14601 • U. S. A.

BILLED TO
ELGIE & COMPANY
P O BOX 1899
34-35 GARDINER STREET
DURBAN SOUTH AFRICA
00000

SHIPPED TO

CUST. CODE			SHIPPING NO.	INVOICE NO.	INVOICE DATE
2204	39015	OCEAN FGT	3131102	373985	DEC 07,1973

PART NO.	ORDER NO	DESCRIPTION PRICE DIVISION	U/M	QTY	PRICE	AMOUNT
0051397	11278	390-C GEN 50CY GLASS	EA	1.0	8670.00	8670.00
		SER NO 1627				
0000000	11278	EXT CHG EXPORT CRATE				150.00
0000000	11278	EXT CHG CYCLE CONV				50.00
0050382	11278	381-A 50CY UNIT	EA	1.0	371.00	371.00
		SER NO T168				
0000000	11278	EXT CHG CYCLE CONV				30.00
		NO T168				
		H 64 1/2				
		L 55 3/4				
		W 55 3/4				
		WT 1880				
		SHIP NO 286M				

X

224'

SHURON/CONTINENTAL
Division of Textron Inc.
P. O. Box 331
Rochester, New York 14601
U. S. A.

Susan M Ward

We certify that this invoice is correct, and that these goods are the product of the U. S. A.

DOEANE-CUSTOMS
1 MR 1974
30
DURBAN

Missing

Sold by Textron DISC Inc.
as commission agent

RECEIVED
26 APR 1974

TOTAL QUANTITY	2.0	TOTAL	9271.00

ORIGINAL INVOICE P-3

Plaintiff's Exhibit 4
(Trucker's Copy of Dock Receipt)

[Photostat]

(Opposite) ☛

DOCK RECEIPT

1 Ex No. 4 3/19/76 DT

5

SHIPPER/EXPORTER
HURON CONTINENTAL
P.O. BOX 331
ROCHESTER, NEW YORK

DOCUMENT NO. 207

EXPORT REFERENCES
I.T.O.

FORWARDING AGENT - REFERENCES
1974 MAR 15 AT 8 03
COPELAND SHIPPING INC., 11321-02

CONSIGNEE

POINT AND COUNTRY OF ORIGIN

DOMESTIC ROUTING/EXPORT INSTRUCTIONS
COTY TRUCKERS/ ON HAND NO. MIA.8704

NOTIFY PARTY

PIER OR AIRPORT
XXXXXXXXXX BKLYN ARMY BASE

ONWARD INLAND ROUTING

EXPORTING CARRIER (Vessel/Airline)
SO.AFR.MORGENSTERN 3/15

PORT OF LOADING
NEW YORK

AIR/SEA PORT OF DISCHARGE
DURBAN

FOR TRANSSHIPMENT TO

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
ELGIE & COMPANY P.O.BOX 1899 54-55 GARDINER ST DURBAN SOUTH AFRICA 203M,291M,290M, 289M,288M,287M 286M	11 1	TW.CTNS./OPTICAL MACHINERY & CRATE / ACCESSORIES.	4512	381

DELIVERED BY:

LIGHTER
TRUCK ....

ARRIVED- DATE .... TIME ....

UNLOADED-DATE .... TIME ....

CHECKED BY..............................

PLACED IN SHIP / ON DOCK LOCATION ....

RECEIVED THE ABOVE DESCRIBED GOODS OR PACKAGES SUBJECT TO ALL THE TERMS OF THE UNDERSIGNED'S REGULAR FORM OF DOCK RECEIPT AND BILL OF LADING WHICH SHALL CONSTITUTE THE CONTRACT UNDER WHICH THE GOODS ARE RECEIVED, COPIES OF WHICH ARE AVAILABLE FROM THE CARRIER ON REQUEST AND MAY BE INSPECTED AT ANY OF ITS OFFICES.

FOR THE MASTER

BY ....
RECEIVING CLERK

DATE ....

502
WHSE NO. 0846

P-4

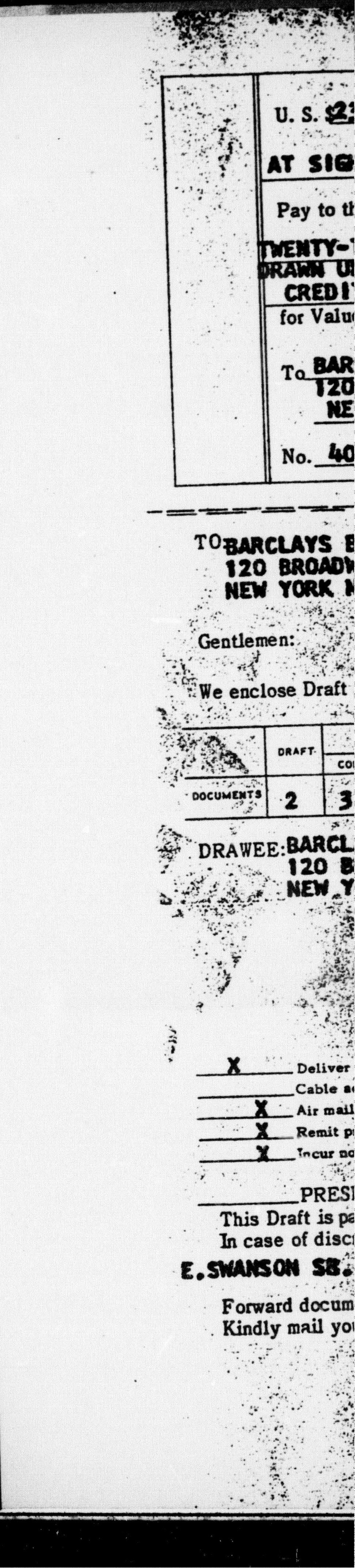
ONLY CLEAN DOCK RECEIPT ACCEPTED.

J 577a

Plaintiff's Exhibit 5
(Copy of Sight Draft)

[Photostat]

(Opposite) ☛



U. S. $2

AT SIG

Pay to th

TWENTY-T
DRAWN U
CREDIT

for Valu

To BAR
120
NE

No. 40

TO BARCLAYS B
120 BROADW
NEW YORK N

Gentlemen:

We enclose Draft

	DRAFT	
		CO
DOCUMENTS	2	3

DRAWEE: BARCL
120 B
NEW Y

X Deliver
Cable a
X Air mail
X Remit p
X Incur no

PRESI
This Draft is pa
In case of disc

E. SWANSON SB.

Forward docum
Kindly mail yo

P-EX No. 5
3-19-76

,244.12 | NEW YORK N.Y. APRIL 16,1974 19

T------------------------------------ of this F I R S T of Exchange (Second unpaid)

e Order of SHURON CONTINENTAL ------------------------------------

THREE THOUSAND TWO HUNDRED FORTY-FOUR DOLLARS & 12/100 United States Dollars
NDER BARCLAYS BANK D.C.O. DURBAN FOREIGN BRANCH IRREVOCABLE
T NO.-:FB 1396

e received and charge the same to account of

CLAYS BANK INTERNATIONAL
BRAODWAY
W YORK ,N.Y.

3M

SHURON CONTINENTAL

Authorized Signature

ANK INTERNATIONAL
AY
.Y.

FROM: SHURON CONTINENTAL
40 HUNBOLDT STREET
ROCHESTER NEW YORK 14609

COUNTRY: SOUTH AFRICA

and documents listed below for:

☐ COLLECTION
☒ PAYMENTS UNDER L/C FB 1396

INVOICES				CERTIFICATES						BILL OF LADING	P.P. RECEIPT	PACKING LIST	AWB
MM.	VISAED	EXP.	CONSUL.	ANALYSIS	QUALITY	INS.	INSP.	ORIGIN	WEIGHT				
			3			2				3-2			

AYS BANK INTERNATIONAL
RAODWAY
ORK N.Y.

DATE: APRIL 16,1974

TENOR: SIGHT

AMOUNT $23,244.12

SHIPPERS REF: 403M

OUR REF: #1321-02

BARCLAYS BANK
120 BROADWAY
BILL DEPARTMENT
RECEIVED
APR 17 2 51 PM '74

documents against XXXXXX~~acceptance~~/payment.
dvice of non-payment.
advice of non-payment.
roceeds by air mail.
cable expense on this draft.

XX All charges for account of drawee/XXX~~drawer~~.
____ Waive charges if they are refused by drawee.
XX Do not protest.
____ Allow ____% discount on merchandise invoice if paid at ____ sight.

ENT DOCUMENTS ON APPROVAL BASIS
ayable in U.S. dollars, plus exchange and collection fees.
repancies or any question regarding documents please contact
at 341-2200

ents thru:
ur remittance to: SHURON CONTINENTAL
40 HUMBOLDT STREET
ROCHESTER NEW YORK 14609

SPECIAL INSTRUCTIONS:

BARCLAYS BANK
120 BROADWAY
BILL DEPARTMENT
RECEIVED
APR 17 2 51 PM '74

J 579a

Plaintiff's Exhibit 6

(Last Page of Invoice from Shuron Continental to Elgie & Company Reflecting Freight Charges)

[PHOTOSTAT]

(Opposite) ☞

SHURON CONTINENTAL
A Textron COMPANY
P. O. BOX 331 • ROCHESTER, NEW YORK, 14601 • U. S. A.

P EX 6 EVD 3-19-76
97

BILLED TO
ELGIE & COMPANY
P O BOX 1899
34-5 GARDINER STREET
D BAN SOUTH AFRICA
00000

SHIPPED TO

CUST. CODE			SHIPPING NO.	INVOICE NO.	INVOICE DATE
2204	39016	OCEAN FGT - NYC	3131107	25844	JAN 25,1974

PART NO	ORDER NO	DESCRIPTION PRICE DIVISION	U/M	QTY	PRICE	AMOUNT
000011	11278	38-D 230V-60 CY MECH	EA 1	XXX	XXXXXXXXXX	XXXXXXXXX ✓
		SER NOS 4430 4442 4525		1.0	1102.00	1102.00 ✓
000000	11278	EXTRA CHG EXPORT CRATE				11.00XXXXX
000000	11278	EXTRA CHG CYCLE CONV				XXXXX
		SHIP NO 403M				10.00
		900 LBS	1	INVOICE	373987 -	214.00
		L 31 1/4 W 39 1/4	1	INVOICE	373988 -	344.00
		H 30 1/4		INVOICE	373985	9271.00 ✓
				INVOICE	373989 -	2557.00
			1	INVOICE	379421 -	3369.00
			3	INVOICE	373986 -	1228.29
			1	INVOICE	373991	2124.00
			2	INVOICE		1899.29
				OCEAN FREIGHT		895.02
				INLAND FREIGHT		162.52
				INSURANCE		56.00
				FORWARDING		
				C.I.F. DURBAN		$23,244.12

1 [illegible]

SHURON/CONTINENTAL
Division of Textron, Inc.
P. O. Box 331
Rochester, New York 14601
U. S. A.

Susan M Ford

RECEIVED
26 APR 1974

We certify that this invoice is correct, and that these goods are the product of the U. S. A.

Sold by Textron DISC Inc.
as commission agent

TOTAL QUANTITY		TOTAL	
	31		$23,027.89
			3XXXXXXX

DUPLICATE INVOICE P-6

J 581a

INTERNATIONAL ... AUXILIARY SERVICE

COPELAND SHIPPING, INC.
SUBSIDIARY OF JET AIR FREIGHT – F.M.C. # 1095

248-06 ROCKAWAY BLVD., JAMAICA, NEW YORK 11422

CABLE ADDRESS
"LANDCOPE" NEW YORK

TELEPHONE
(212) 341-2200

F.M.C. NO. 92

P.Ex '79
3-19-79
G.T.

Plaintiff's Exhibit 7

(Shipper's Copy of Ocean Freight Bill)

[PHOTOSTAT]

(Opposite) ☛

and, unless insurance is in terms of this Credit to be arranged here by accreditors)

#7

SOUTH AFRICAN MARINE CORPORATION (N.Y.) 17 BATTERY PLACE, NEW YORK, N.Y. 10004 – TEL. 212-344-8940

DATE	VOYAGE # SO.BOUND	EXIT PORT	ENTRY PORT	B/L NO.	OPT. B/L	PAYABLE
3/18/74	19	NY	4D	66		NEW YORK

CON. NON CON.	SHIPPER REF. NO.	VESSEL NAME
	11321-02	MORGENSTER

ENTRY PORT CODE	PORT
01	CAPETOWN
02	PORT ELIZABETH
03	EAST LONDON
04	DURBAN
05	LOURENCO MARQUES
06	BEIRA
07	

P. NEDERBURG

LINE NO.	ABBR.	ITEM CODE	CUBE	WEIGHT	RATE	FREIGHT BASIS		DOLLAR AMOUNT
						MEAS.	WGHT.	
		12	381.	4[illegible]2.	152.00 40CF	381.		1447.60
				SURCH	20.00PCT/FR	0.		289.56
				SURCH	17.00PAYTON	0.		161.93
								1899.29

SHIPPER SHARON CONTINENTAL

Check 3/20

Pd 3/22

FORWARDER COPELAND SHIPPING INC.

DUE BILL EXECUTED ON BEHALF OF SHIPPERS

Received from South African Marine Corp. (N.Y.) the original Bill of Lading for cargo on which freight and charges are specified herein, in consideration of which we agree to pay said charges within fifteen (15) days from date thereof. The goods shall remain subject to a lien for freight charges until paid. For and in behalf of the Shippers.

By________________________ Agent

P-EX 7 ED
3-19-76
GS

P-7

J 583a

EXPORT REFERENCES

DOCK RECEIPT

D. Ex B [illegible] INEVD 5-19-76

SHIPPER/EXPORTER

DOCUMENT NO. 207

EXPORT REFERENCES

Plaintiff's Exhibit 8

(Haight Gardner's Letter of March 15, 1976 Stipulating as to Ocean Freight)

[Photostat]

(Opposite) ☞

P. Ex 8 Evd
3-19-76

J. WARD O'NEILL
BERNARD D. ATWOOD
JAMES M. ESTABROOK
EDWARD H. MAHLA
JOHN C. MOORE
MacDONALD DEMING
JOHN OSNATO, JR.
WILLIAM J. JUNKERMAN
GORDON W. PAULSEN
M. E. DeORCHIS
WILLIAM P. KAIN, JR.
DAVID P. H. WATSON
RICHARD G. ASHWORTH
EDWARD L. JOHNSON
RICHARD B. BARNETT
MAURICE L. NOYER
SANFORD C. MILLER
CHARLES S. HAIGHT, JR.
FRANCIS X. BYRN
THOMAS R. H. HOWARTH
STEPHEN K. CARR
WALTER E. RUTHERFORD
R. GLENN BAUER
THEODORE M. SYSOL
CARROLL E. DUBUC
THOMAS F. MOLANPHY
LENNARD K. RAMBUSCH
JAMES J. SENTNER, JR.

HAIGHT, GARDNER, POOR & HAVENS
ONE STATE STREET PLAZA
NEW YORK, N.Y. 10004
TELEPHONE (212) 344-6800
CABLE: MOTOR NEW YORK
RCA TELEX: 222974
WUI TELEX: 620362
WU TELEX: 127683

WASHINGTON OFFICE
FEDERAL BAR BUILDING
1815 H STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE (202) 737-7847
CABLE: MOTOR WASHINGTON
WASHINGTON WU TELEX: 892598
RALPH E. CASEY
CARROLL E. DUBUC
RESIDENT PARTNERS, WASHINGTON

1976 MAR.

J.T.K.

March 15, 1976

Bigham, Englar, Jones & Houston
99 John Street
New York, New York 10038

Attention: John Kochendorfer, Esq.

S.A. NEDERBURG VOYAGE 28SB
B/L #66 - New York/Durban
Non-Delivery One Crate
Optical Equipment Machinery
Our file: 715-1159

Dear Sirs:

Pursuant to our telephone conversation this date, we will agree and stipulate that the total ocean freight for the 1 package of optical equipment involved in this matter was $557.55.

For your information, the computation was based on the package being 118 cubic feet with a freight rate plus other charges totalling $184.00 per 40 cubic feet.

Very truly yours,

HAIGHT, GARDNER, POOR & HAVENS

By Brian D. Starer
Brian D. Starer

BDS:dmc

P-8

J 585a

Plaintiff's Exhibit 9

(Invoice Dated April 16, 1974 from Copeland Shipping to Shuron Continental)

[PHOTOSTAT]

(Opposite) ☛

COPELAND SHIPPING, INC.

SUBSIDIARY OF JET AIR FREIGHT – F.M.C. # 1095

[illegible] 3-19-78
D.T.

☒ 248-06 ROCKAWAY BLVD., JAMAICA, NEW YORK 11422
☐ 380 ALLERTON ROAD, S. SAN FRANCISCO, CALIF. 94080
☐ BUILDING No. 2140, MIAMI INT'N'L AIRPORT, MIAMI, FLA. 33148
☐ 900 FLORENCE AVENUE, INGLEWOOD CALIF.

CABLE ADDRESS
"LANDCOPE" NEW YORK

TELEPHONE
(212) 341-2200

F.M.C. NO. 92

TO SECURE PROPER CREDIT PLEASE REFER TO THIS NUMBER WHEN PAYING THIS INVOICE

DATE	CUSTOMER NO.		INVOICE NO.	S/S NO.	WEIGHT	DESTINATION	YOUR REFERENCE NO.
4/16/74		A	11321-02	40027	4512	864	

INVOICE TO

SHURON CONTINENTAL
40 HUMBOLDT STREET
ROCHESTER NEW YORK

Marks and Numbers AS PER ATTACHED B/L

Vessel SA NEDERBURG

Date: 3/15/74

Shipped to: DURBAN SOUTH AFRICA

COLLECT - OCEAN FREIGHT (CODE 1)

PREPAID CHARGES DUE	CODE*	AMOUNT
381CFT @ 152.00 PER 40 CFT -- $1447.80 S/C 20.00 PER 40 CFT 289.56 S/C 17.00 PER 40 CFT 161.93	1	1899.29
	2	30.00
	9	15.00
	12	11.00
	6	163.52
	7	895.02
	20	6.77
TOTAL DUE		$3,020.60

*TYPE CHARGE CODE

1. FREIGHT
2. FORWARDING SERVICES
6. INSURANCE
7. INLAND FRT.
8. PACKING
9. CONSOLIDATION
10. CONSUL FEES & BLANKS
11. CABLES
12. PREPARATION DOCUMENTS
13. MESSENGER FEES
14. POSTAGE
20. HANDLING/WAREHOUSING
66. PICK UP
99. PETTIES

MAKE ALL CHECKS PAYABLE TO:
COPELAND SHIPPING, INC.
900 W. FLORENCE AVE., INGLEWOOD, CALIF.

MAIL TO:

P-9

J 587a

Defendant's Exhibit A
(Barclay's Irrevocable Letter of Credit)

[Photostats]

(Opposite) ☛

COPELAND SHIPPING, INC.

SUBSIDIARY OF JET AIR FREIGHT — F.M.C. # 1095

P.Ex '79
3-19-79
D.T.

CABLE ADDRESS
"LANDCOPE" NEW YORK

TELEPHONE
(212) 341-2200

F.M.C. NO. 92

☒ 248-06 ROCKAWAY BLVD., JAMAICA, NEW YORK 11422
☐ 380 ALLERTON ROAD, S. SAN FRANCISCO, CALIF. 94080
☐ BUILDING No. 2140, MIAMI INT'N'L AIRPORT, MIAMI, FLA. 33148
☐ 900 FLORENCE AVENUE, INGLEWOOD CALIF.

TO SECURE PROPER CREDIT PLEASE REFER TO THIS NUMBER WHEN PAYING THIS INVOICE

DATE	CUSTOMER NO.		INVOICE NO.	S/S NO.	WEIGHT	DESTINATION	YOUR REFERENCE NO.
4/16/74		A	11321-02	40027	4512	864	

INVOICE TO

SHURON CONTINENTAL
40 HUMBOLDT STREET
ROCHESTER NEW YORK

Marks and Numbers AS PER ATTACHED B/L

Vessel SA NEDERBURG Date: 3/15/74

Shipped to: DURBAN SOUTH AFRICA

COLLECT - OCEAN FREIGHT (CODE 1)

PREPAID CHARGES DUE	CODE*	AMOUNT
381EFT @ 152.00 PER 40 CFT -- $1447.80		
S/C 20.00 PER 40 CFT 289.56		
S/C 17.00 PER 40 CFT 161.93	1	1899.29
	2	30.00
	9	15.00
	12	11.00
	6	163.52
	7	895.02
	20	6.77
TOTAL DUE		$3,020.60

*TYPE CHARGE CODE
1. FREIGHT
2. FORWARDING SERVICES
6. INSURANCE
7. INLAND FRT.
8. PACKING
9. CONSOLIDATION
10. CONSUL FEES & BLANKS
11. CABLES
12. PREPARATION DOCUMENTS
13. MESSENGER FEES
14. POSTAGE
20. HANDLING/WAREHOUSING
66. PICK UP
99. PETTIES

MAKE ALL CHECKS PAYABLE TO:
COPELAND SHIPPING, INC.
MAIL TO: 900 W. FLORENCE AVE., INGLEWOOD, CALIF.

P-9

D. EX A EVD
3-19-76 GT

Form CRE 83 (S.A.)
12/69

RECEIVED
SEP 11 1973
INTERNATIONAL

BARCLAYS BANK D.C.O.

BARCLAYS [illegible] BANK LIMITED
DURBAN, NATAL.
Branch

6th September, '73 Date

IRREVOCABLE CREDIT No.:- FB 1396

BENEFICIARY(IES) TO:- SHURON CONTINENTAL, 40 HUMBOLDT ST. ROCHESTER, NEW YORK, U.S.A. 14609	~~ADVISED THROUGH~~
ACCREDITOR(S) ELGIE & COMPANY, P.O. BOX 1899, DURBAN.	~~THIS IS A CONFIRMATION OF THE CREDIT ADVISED BY CABLE TODAY THROUGH~~ . . . (Delete where necessary)

Dear Sir(s),

We are pleased to advise that for account of the accreditor(s) we have established an Irrevocable Credit in your favour available by your draft(s) up to an aggregate amount of US $ 32 000,00
(say Thirty two thousand United States Dollars.)
drawn upon Barclays Bank International, 120 Broadway, New York, NY 10005

at .... sight for 100 per cent of the C.I.F. invoice value of
Optical Machinery/Accessories

to be shipped or consigned from any U.S.A. Port to Durban
not later than 31st December, 1973.

Part shipments ~~allowed~~ / not allowed

Transhipment ~~allowed~~ / not allowed

Insurance is to be effected by ~~accreditor(s)~~/beneficiary(ies)

Drafts are to be accompanied by:-

Certified Customs Invoices, in triplicate

Full set of clean "On Board" Shipping Company's Bills of Lading to order blank endorsed, marked "Freight Prepaid"

Other documents:-

and, unless insurance is in terms of this Credit to be arranged here by accreditor(s)
Marine Insurance Policy or Certificate (in duplicate) endorsed in blank for the invoice value of the goods plus 10 per cent, including Warehouse to Warehouse clause
Institute Cargo Clause (all risks) claims payable in South Africa
and cover against Strikes, Riots and Civil Commotions and War Risks.

Special Instructions (if any):- 1) All bank charges outside South Africa are for the account of the beneficiary.

Drafts drawn hereunder are to be marked "Drawn under Barclays Bank D.C.O., DURBAN FOREIGN branch Irrevocable Credit No.:- FB 1396 "

All drafts drawn under this Credit must at the time of negotiation be endorsed on the reverse of this form by the negotiating bank and the presentation of any draft shall be a warranty by the negotiating bank that such endorsement has been made. This Credit should be attached to any draft which exhausts the Credit.

We undertake that drafts and documents drawn under and in strict conformity with the terms of this Credit will be duly honoured on presentation if in order.

Unless previously exhausted this Credit shall cease to be available for negotiation of beneficiary's drafts after 7th January, 1974.

Subject to Uniform Customs and Practice for Documentary Credits (1962 Revision), International Chamber of Commerce Brochure No. 222.

Yours faithfully,

Accountant.
(Sig. Book Page/Supp. No.)

Manager.
(Sig. Book Page/Supp. No.)

D. C4 A-1

DIRECTIONS TO NEGOTIATING BANK

1. One set of negotiable documents is to be sent by airmail to BARCLAYS [illegible] LIMITED
FO[illegible]
P.O. B[illegible]
DURBAN, NATAL.
AND REMAINING SETS BY AIRMAIL

2. A certificate that documents have been disposed of as required and that all terms of the credit have been complied with, is to be attached to the First of Exchange.

Where this form is in confirmation of a cable advice, this credit is available only for any amount that has not already been availed of under such cabled advice and may not be availed of at all unless attached to our branch's or correspondent's notification of such cabled advice, the two jointly constituting evidence of the undrawn balance of the credit.

PARTICULARS OF DRAFTS NEGOTIATED UNDER THIS CREDIT:-

Date	Name of Negotiating Bank	Amount in Words	Amount

D Cy A-2

DOCK RECEIPT

D. Ex B ~~[illegible]~~ INERD 5-19-76

SHIPPER/EXPORTER

SHURON CONTINENTAL
P.O. BOX 331
ROCHESTER, NEW YORK

DOCUMENT NO. 207 HT

EXPORT REFERENCES

I.T.O.
1974 APR 10 AM 8:03

CONSIGNEE

FORWARDING AGENT - REFERENCES

COPELAND SHIPPING INC., 11321-02

POINT AND COUNTRY OF ORIGIN

NOTIFY PARTY

DOMESTIC ROUTING/EXPORT INSTRUCTIONS

COTY TRUCKERS/ ON HAND NO. [illegible].8704

PIER OR AIRPORT

~~XXXXXXXXX~~ BKLYN ARMY BASE

EXPORTING CARRIER (Vessel/Airline): S.A. NEDERBURG 3/15

PORT OF LOADING: NEW YORK

AIR/SEA PORT OF DISCHARGE: DURBAN

FOR TRANSSHIPMENT TO

ONWARD INLAND ROUTING

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
ELGIE & COMPANY P.O.BOX 1899 54-55 GARDINER ST DURBAN SOUTH AFRICA 403M,291M,290M, 289M,288M,287M 286M	11 1	TW.CTNS:/OPTICAL MACHINERY & CRATE / ACCESSORIES.	[illegible] 492-4810	381

6/3
4924810
Antony will advise
Antony said he only had stowage for 66

11 } 2 #4 LTD 5 [illegible] 3 4/H 0
4 - 5

DELIVERED BY:

LIGHTER
TRUCK ....

ARRIVED- DATE .... TIME ....

UNLOADED-DATE .... TIME ....

CHECKED BY ....

PLACED IN SHIP / ON DOCK LOCATION ....

RECEIVED THE ABOVE DESCRIBED GOODS OR PACKAGES SUBJECT TO ALL THE TERMS OF THE UNDERSIGNED'S REGULAR FORM OF DOCK RECEIPT AND BILL OF LADING WHICH SHALL CONSTITUTE THE CONTRACT UNDER WHICH THE GOODS ARE RECEIVED, COPIES OF WHICH ARE AVAILABLE FROM THE CARRIER ON REQUEST AND MAY BE INSPECTED AT ANY OF ITS OFFICES.

FOR THE MASTER

BY ....
RECEIVING CLERK

DATE ....

502
WHSE NO. 0846

D. Ex B-1

ONLY CLEAN DOCK RECEIPT ACCEPTED.

Lighter }
Car } No. 2017
Truck } 9894 JH

Started Date ....
Finished Date ....
Location ....

SHIPPERS ARE REQUIRED TO FILL OUT AS BELOW

MARKS	NO. of Pkge.	MEASUREMENTS						Total Cubic Ft.		Weight Gross
		Length		Breadth		Depth				
		Ft.	In.	Ft.	In.	Ft.	In.	Ft.	In.	
							Totals			

= 11

1 = 1

⑫

Rec ⑫

3/12/74

94/96

D- Fed B-2

J 589a

Defendant's Exhibit B

(Ocean Carrier's Copy—Dock Receipt)

[Photostats]

(Opposite) ☛

J 591a

Defendant's Exhibit C

(Voyage 28—Nederburg Stowage Plan)

[Photostat]

(Opposite) ☛

OVERSIZE FOLDOUT(S) FOUND HERE IN
THE PRINTED EDITION OF THIS VOLUME
ARE FOUND FOLLOWING THE LAST PAGE
OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1

SOUTH AFRICAN MARINE CORPORATION, LTD. (Carrier No. 1)

SPRINGBOK LINE, LTD. (Carrier No. 2)

SPRINGBOK SHIPPING COMPANY, LTD. (Carrier No. 3)

AFRICAN LIFE CENTRE,
THIBAULT SQUARE, CAPETOWN
REPUBLIC OF SOUTH AFRICA

GENERAL CARGO FORM
S.P. 9-60

BILL OF LADING

Received the following described goods or packages said to contain goods, in apparent good order and condition unless otherwise indicated herein, to be transported to the port of discharge or transshipment, or so near thereunto as the vessel may always safely get and leave, always afloat at all stages and conditions of water and weather and there to be delivered or transshipped, all subject to all the terms herein.

It is agreed that the following terms shall govern the relations, whatever they may be, between the parties herein included in the words "shipper" and "carrier" in every contingency whenever, wherever and however occurring and even in case of deviation or unseaworthiness of the ship at the time of loading, inception of the voyage or subsequently and none of the terms of this bill of lading shall be considered to have been waived unless by an express written waiver signed by a duly authorized agent of the carrier.

1. This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the U. S. 1936, or of the Carriage of Goods by Sea or similar Act in force in any locality where this bill of lading may be issued. All the provisions of such Act are incorporated herein and except as may be specifically provided herein shall govern throughout the entire time that the goods are in the custody of the carrier and nothing herein contained shall be considred a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. The carrier shall not be liable in any capacity whatever for any delay, non-delivery, misdelivery, loss of, damage to, or charges against the goods occurring while they are not in the actual custody of the carrier. This bill of lading is also subject to and incorporates the provisions of Secs. 4281-4286, 4289 of the U. S. Revised Statutes and amendments thereto. The carrier shall be entitled to all limitations and exemptions from liability in the laws of any country whose laws apply. This bill of lading is a contract with the actual owner or demise or time charterer of the vessel as principal. The company or line issuing this bill of lading, if not the owner or demise or time charterer, is agent only for such owner or charterer and shall not be under any personal liability whatever.

2. Nothing in this bill of lading is to be read as an engagement that the said carriage shall be performed directly or without delays. Without limitation of any right the carrier may have in this bill of lading, the carrier may substitute another vessel, discharge and/or transship and/or forward the whole or any part of the goods before or after loading at the original port of shipment or at any other place by any other vessel or other means, whether operated by the carrier or by others and whether leaving or arriving at the port of shipment or transshipment or destination before or after the carrier's vessel expected to be used for the transportation of the goods. The vessel, with any part of the goods on board, either before or after proceeding toward the port of discharge and for any purpose whatever that the master may consider advisable, may stay in port, adjust compasses, dock, go on ways or to repair yards, shift berths, lie on the bottom in berth, move from place to place in any port, take fuel or stores, load or discharge cargo, sail without pilots, tow and assist vessels or be towed, save life, property of the carrier or others, proceed via the Panama Canal and/or Straits of Magellan and/or Cape Horn and/or Suez Canal and/or Cape of Good Hope or otherwise by any route or through any waters whatever. The vessel may omit calling at any port, whether scheduled or not, may deviate from, or change the advertised, usual, geographical or intended route at any stage of the voyage and may proceed beyond or in a contrary direction to or outside the usual route to the port of discharge and may proceed to and stay at and load or discharge at any place whatever, as inducements may offer, backwards or forwards, once or oftener, and may load, carry or discharge cargo at, for or between intermediate or other ports, whether on this voyage or a preceding or subsequent voyage, even though two or more of such voyages may overlap. Any such procedure shall be considered within the voyage herein intended as fully as if specifically described herein. The provisions of this clause are not to be considered as restricted by any words of this contract, whether written, stamped or printed.

3. The carrier shall not be under the liability of a carrier with respect to the goods except during such time as they may actually be in the carrier's custody. The carrier shall not be liable in any capacity whatever for any loss, damage, delay, misdelivery or failure to deliver, or any claim whatever, whenever and however occurring, unless shown to have been caused by the carrier's negligence. The burden of proving negligence shall be on the party asserting it. There shall not be any inference of negligence from the fact, nature or extent of damage.

4. The carrier shall have liberty to comply with any orders, directions or suggestions whatever with respect to the ship or goods whenever given by any person acting or purporting to act with the authority of any government or of any department thereof, or by any committee or person having, or purporting to have, under the terms of the war risk insurance on the ship, the right to give such orders or directions. If, in consequence of such compliance by the carrier, the unrestricted space available to the carrier for the carriage of cargo is less than the full cargo capacity of the ship, the carrier may postpone the carriage of any part of the goods contracted for herein till some later date or cancel in whole or in part the engagement for carriage of all or any part of the goods and if any part of the goods has been loaded, may require the owner, shipper or consignee to take delivery of the goods alongside the ship, and the carrier shall not be under any further responsibility with respect thereto. Without limitation of any other provision herein, in any situation whatever or wherever occurring and whether existing or anticipated before commencement of, or during the voyage, which, in the judgment of the carrier is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to, or loss of the ship or any part of the cargo or to make it unsafe, imprudent or unlawful for any reason to commence or continue the voyage, or to give rise to delay or difficulty in arriving, entering, discharging at or leaving the port of discharge or the usual or intended place of discharge in such port, the carrier may decline to load, or before or after loading or before the commencement of the voyage may require the shipper or other person entitled thereto, to take delivery of the goods at port of shipment and on their failure to do so, may warehouse the goods at their risk and expense; or the carrier, whether or

7. Live animals, birds, reptiles and fish are received and carried on the condition that they shall be considered goods and subject to all terms and provisions in this bill of lading and the Carriage of Goods by Sea Act relating to goods.

8. Fruits, vegetables, meats and any similar kind of goods will be carried in ordinary cargo compartments or holds unless it has been agreed in writing at the time of delivery to the carrier that such goods will be carried in a refrigerated, chilled or specially ventilated compartment at a special rate of freight. Where a special rate of freight is not paid, the shipper represents and agrees that such goods do not need, and the carrier will not be required to give them any other treatment than that given to other cargo. The refrigerating, chilling or ventilating machinery and compartments shall be considered part of the machinery and appurtenances of the ship.

9. If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the non-carrying ship or her owners, in so far as such loss or liability represents loss of or damage to or any claim whatever of the owners of said goods, paid or payable by the non-carrying ship or her owners to the owners of said goods and set-off recouped or recovered by the non-carrying ship or her owners as part of their claim against the carrying ship or carrier. The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact.

10. In case of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatever, whether due to negligence or not, for which, or for the consequences of which, the carrier is not responsible by statute, contract or otherwise, the goods, their owners, shippers or consignees shall contribute with the carrier in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred and shall pay salvage and special charges incurred in respect to the goods. If the salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if the salving ship were owned or operated by strangers. General Average shall be adjusted at any port or place selected by the carrier and according to **York-Antwerp Rules of 1950, without exclusions, and as to** matters not therein provided for according to the laws and usages at the port of New York or at carrier's option at the last port of discharge. The General Average statement in every instance shall be prepared by average adjusters selected by the carrier. In average adjustments, disbursements in foreign currency shall be exchanged into U. S. dollars at the rate prevailing at time of payment and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port of final discharge of such damaged cargo. Such deposit, agreement or other security as the carrier or its agents may consider requisite to cover the estimated contribution of the goods and any salvage and special charges thereon shall be made by the goods or shippers to the carrier, if required, before delivery. Any deposits shall be payable at carrier's option in U. S. dollars and shall be remitted to the adjuster to be held by him in a special account at the place of adjustment pending settlement of the General Average, if any. Refunds or credit balance shall be paid in U. S. dollars.

11. The port authorities are hereby authorized to grant a general order for discharging immediately on arrival of the ship, and the carrier, without giving notice either of arrival or discharge, may discharge the goods directly they come to hand at or upon any wharf, craft or place that the carrier may select and continuously, Sundays and holidays included, at all such hours by day or by night as the carrier may determine, no matter what the state of the weather or custom of the port may be, and the goods shall be received, package by package, as discharged from the ship's tackle, if required by the carrier. The carrier shall not be liable in any capacity or respect whatever if heat or refrigeration or special cooling facilities shall not be furnished during loading or discharging or any part of the time that the goods are upon the wharf, craft or the place of loading or discharging. All lighterage and use of craft in loading or discharging shall be at the risk and expense of the goods and shall be provided by shipper. If, notwithstanding, any arrangements for lighterage or craft are made by the carrier, it shall be considered solely the agent of shipper and consignee and without any responsibility whatever. Landing and delivery charges and pier dues shall be at the expense of the goods unless included in the freight herein. Liquid cargo in bulk shall be pumped aboard by shipper so fast as vessel can receive at shipper's risk and expense so far as the vessel's connection and shall be received at port of discharge at vessel's connection at vessel's rail so soon and so fast as vessel is prepared to deliver. So soon as the goods are at the disposal of the consignee for removal they shall be at their own risk and expense and delivery by the carrier shall be considered complete. If the goods are not removed by the consignee within the next working day after they are at his disposal, they may, at carrier's option and subject to carrier's lien, be sent to store or warehouse or be permitted to lie where landed, but always at the risk and expense of the goods. The goods shall be considered to be delivered and at their own risk and expense in every respect when taken into the custody of customs or other authorities. The carrier shall not be

not proceeding toward or attempting to enter the port of discharge, may proceed by any route or return directly or indirectly to or stop at such other port or place whatever as the carrier may consider safe or advisable under the circumstances, once or oftener, backwards or forwards in any order and discharge the goods at any place he may select there, or the carrier may retain the cargo on board until a return trip or until such time as the carrier thinks advisable and discharge the goods at any place whatever as herein provided, or the carrier may discharge and forward the goods by any means whatever, all at the risk and expense of the goods. The carrier is not required to give notice of discharge or forwarding. Whenever the goods are discharged from the ship they shall be at their own risk and expense. Such discharge shall constitute complete delivery and performance under this contract and the carrier shall be free from any further responsibility. The carrier shall be entitled to a reasonable extra compensation for any services in connection with the foregoing above the agreed freight. The ship may carry contraband, explosives, munitions, warlike stores, hazardous cargo and may sail armed or unarmed and with or without convoy.

5. Unless otherwise stated herein, the description of the goods and the particulars of the pieces, packages or customary freight units mentioned herein, are those furnished by the shipper, and the carrier shall not be concluded as to the correctness of leading marks, number, quantity, weight, gauge, measurement, contents, nature, quality or value. Each piece or package shall be clearly and durably marked on the outside in letters at least two inches high, with the name of the port of discharge and the weight, if it exceeds 4480 lbs. Any such weight shall be declared in writing by the shipper on shipment and the shipper shall pay extra charges that may be incurred for loading, handling, transshipping or discharging. The shipper and the goods shall be liable for and shall indemnify the carrier in respect of any injury, loss, damage or claim whatever on the part of anyone whatever arising from shipper's failure to declare correctly the nature, character and weight of the goods and mark them as above provided, or from failure to mark the goods or package as provided by law.

6. The shipper represents that the goods need not be stowed under deck unless the shipper informs the carrier in writing before delivery of the goods to the carrier that underdeck stowage is required. Goods stowed in poop, forecastle, deckhouse, shelterdeck, passenger space or any other covered and enclosed space commonly used in the trade for the carriage of goods shall be considered for all purposes as stowed under deck. Goods may be restowed at any time considered desirable. In respect of goods carried on deck and so stated herein, all risks of loss or damage by perils inherent in such carriage shall be borne by the shipper, but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the provisions of said Carriage of Goods by Sea Act, nothwithstanding Section 1(c) thereof or the corresponding provision of any Carriage of Goods by Sea Act that may be applicable. Specially heated or cooled stowage is not to be furnished unless contracted for at an increased freight rate. The articles described in 4281 of said Revised Statutes shall not be considered delivered to the carrier until they are placed in the possession of, and signed by, the master or other officer on board the vessel and in charge of the deck at the time. Delivery of such articles at the port of discharge shall be taken upon the vessel's deck and any responsibility of the carrier shall thereon wholly cease.

required to give any notice of disposition of the goods. If the vessel's loading or discharge is delayed through failure of shipper to supply cargo or to furnish lighterage or use of craft in discharging or to receive or remove the goods so that the vessel may load and discharge so fast as she can, the shipper will pay for the detention of the vessel at the current time charter rate in U.S.A. currency, per deadweight ton for every day of detention and pro rata for part of a day.

12. The carrier shall not be liable for failure to deliver in accordance with leading marks unless the goods shall have been marked as herein required and the marks shall be decipherable at the port of transshipment or discharge. Goods that cannot be identified as to marks or numbers, cargo sweepings, liquid residue and any unclaimed goods not otherwise accounted for, shall be allocated to the various consignees of goods of like character in proportion to any apparent shortage, loss of weight or damage and shall be accepted as good delivery. Loss or damage to goods in bulk stowed without separation from other goods in bulk of like quality, either of the same shipper or other shippers, shall be divided in proportion among the several shipments.

13. In case of any loss or damage to or in connection with goods exceeding in actual value $500 lawful money of the United States, per package, or, in case of goods not shipped in packages per customary freight unit, the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the Carrier's liability, if any shall be determined on the basis of a value of $500 per package or per customary freight unit, or pro rata in case of partial loss or damage, unless the nature of the goods and a valuation higher than $500 shall have been declared in writing by the shipper upon delivery to the Carrier and inserted in this bill of lading and extra freight paid if required and in such case if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be deemed to be the declared value and any partial loss or damage shall be adjusted pro rata on the basis of such declared value. If the value of the goods is less than $500 the valuation in the calculation and adjustment of claims against the carrier is agreed to be the invoice value as hereinafter defined. It is understood that the meaning of the word "package" includes pieces and articles of any description except goods shipped in bulk.

14. The goods shall be liable and shall indemnify the carrier for all expense of mending, cooperage, baling, reconditioning, gathering of loose cargo or contents of packages; for any payment, fine, dues, duty, tax or impost, loss, damage, deten- tion, costs and expenses of whatever nature sustained or incurred by or levied upon the carrier or ship in connection with the goods or by reason of the goods being on board, or of any proceeding against or involving the goods by way of attachment, seizure, interpleader or in any way whatever.

15. Freight shall be payable at carrier's option on gross intake or discharged weight or measurement or on the basis of value or of package. Freight may be calculated in the first instance on the particulars of the goods furnished by the shipper, but the carrier may at any time examine, weigh, measure and value the goods. If shipper's particulars are found to be erroneous and additional freight is payable, the goods shall be liable for any expenses incurred in examining, weighing, measuring and valuing the goods. Full freight to port of discharge named herein shall be considered completely earned on receipt of the

D-EX D IN EVD.
3-19-76

GENERAL AGENTS
IN U.S.A.:
SOUTH AFRICAN MARINE CORPORATION (N.Y.)
17 BATTERY PLACE
NEW YORK, N.Y. 10004

Telegrams: "Safmarco, New York"

BILL OF LADING

(Continued from over page)

carrier, whether the freight be stated or intended to be prepaid or to be collected at destination; and the carrier shall be entitled absolutely to all freight and all charges due hereunder, whether actually paid or not, and to receive and retain them under all circumstances whatever, ship and/or cargo lost or not lost. If there shall be a forced interruption or abandonment of the voyage at the port of shipment or elsewhere, any forwarding of any part of the goods, even if by another ship of the carrier, shall be at the risk and expense of the goods. All charges involving payment of money shall be due and payable day by day immediately when they are incurred and shall be paid in full without any offset, counterclaim or deduction, but without prejudice to any claim against the carrier for breach of contract hereunder. All payments shall be made at carrier's option in currency of the port of shipment or of the port of discharge at the current demand rate of New York exchange as quoted on the day the ship arrives off Quarantine Station at the port of discharge. The carrier shall have a lien on the cargo, which shall survive delivery, for all charges due hereunder and may enforce this lien by public or private sale and without notice. The proceeds of sale shall be applied so far as they may go towards settlements of the carrier's charges and the carrier shall not be under any liability for consequences thereof, except to account for the balance, if any, of such proceeds.

16. If goods are shipped with an option for one of several ports of destination, the shipper must give the agents at the first port of discharge notice of the exercise of the option, together with the original bill of lading. 48 hours before arrival at the first port of call. If this is not done, the master may discharge the goods at any one of the ports covered by the option.

17. Neither the carrier nor any corporation owned by, subsidiary to, or make good associated or affiliated with the carrier, shall be liable to answer for or before any loss or damage to the goods occurring at any time and even though whatloading or after discharge from the ship by reason or by means of any fire carrier's ever, wherever and however occurring, unless such fire shall be caused by design or neglect.

18. Whenever the goods are consigned to a point where the ship does not the carrier, expect to discharge, or whenever the carrier may consider it advisable, or after without notice, may forward the whole or any part of the goods before even loading at the original port of shipment or at any other places whatever, port of though outside the scope of the voyage or the route to or beyond the means of discharge or the destination of the goods, by any ship or by other whether transportation by water or by land or by air, or by all such means, before or operated by the carrier or by others and whether departing or arriving arrangements after the ship originally expected to be used. This carrier, in making operated by for transshipping or forwarding by any means of transportation not shipper and this carrier, shall be considered solely the forwarding agent of the forwarding shall without any other responsibility whatever. All transshipment or freight be subject to all the terms whatever in the regular form of bill of lading, carrynote, contract or other shipping document used at the time by the carrier such ing on the transit, whether issued for the goods or not and even though of this terms may be less favorable to the shipper or consignee than the terms liability bill of lading or in any respect whatever, and may exempt the carrier from increase in for negligence. The shipper shall be liable to this carrier for any issuance of freight charges of transshipping or forwarding ship made after the goods may this bill of lading. Pending or during transshipment or forwarding the not be be stored ashore or afloat at their risk and expense and the carrier shall any cirliable for detention. The carrier shall not be liable in any capacity or in arising cumstances whatever for any claim whatever with respect to the goods after discharge of the goods from the ship at the port of transshipment.

19. Written claim against the carrier of liability for any loss, damage, delay after or non-delivery of the goods shall be given to the carrier within 30 days when the removal of the goods from the custody of the vessel or after the date investithe goods should have been delivered, to enable the carrier to make prompt delay or gation of the circumstances in connection with the alleged loss, damage, shall be non-delivery. If such written claim of liability is not given, the carrier and the considered prejudiced thereby and the claim shall be considered waived waiver may be pleaded in and constitute defense of any suit that may be brought thereafter against the carrier on said claim. In any event, the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought by the filing of a libel, complaint or other pleading in court unless the summons, citation or other appropriate process be forthwith issued and delivered to an officer for service.

20. Without limitation of the definition of terms in the Carriage of Goods by Sea Act, the word "ship" or "vessel" shall include any substituted vessel and any craft, lighter or other means of conveyance owned, chartered or operated by the carrier in the performance of this contract; the word "carrier" shall include the vessel named herein, her owner, operator, charterer, master and any substituted carrier, whether the owner, operator, charterer or master shall be acting as carrier or bailee; the word "shipper" shall include the person named as such in this bill of lading, the person for whose account the goods are shipped, the consignee, the holder of the bill of lading properly endorsed, the receiver and the owner of the goods; the word "goods" shall include the whole or any part thereof and those included in the word "shipper"; the word "person" shall include individual, corporation, partnership or other entity; the word "charges" shall include freight, sub-freight, demurrage and all expenses and money obligations whatever, however and whenever incurred and payable by the goods or shipper and they shall be jointly and severally liable for all such charges; the words "invoice value" mean the actual value of the goods at the time and place of shipment and shall not include freight, insurance or any other charges or items whatever, whether stated or included in any consular or commercial invoice or other paper.

21. It is intended that all the terms of this contract shall be valid, enforceable and available to the carrier so far as and whenever the law will permit even where there has been negligence for which the carrier is chargeable, and that in all instances where it may be possible to contract against the consequences of negligence, the carrier, although negligent, shall not be under any liability whatever. If any part of any term of this contract is not enforceable, that circumstance shall not affect the validity of any other part of any term hereof.

22. All agreements or freight engagements for shipment of goods, except liquid goods in bulk, are superseded by this bill of lading and all its terms, whether written, typed, stamped or printed are agreed by the shipper to be binding so fully as if signed by the shipper, any local customs or privileges to the contrary notwithstanding. The terms of the contract for transportation of liquid goods in bulk shall be superseded only in so far as they may be inconsistent with the terms of this bill of lading. One signed bill of lading, duly endorsed, will be surrendered if required to the agent of the vessel at port of discharge in exchange for delivery order.

23. All disputes arising under this bill of lading shall be decided according to the laws of the United States.

24. Exemptions and immunities of all servants and agents of the Carrier. It is hereby expressly agreed that no servant or agent of the Carrier (including shall every independent contractor from time to time employed by the Carrier) to the in any circumstances whatsoever be under any liability whatsoever Bill of Shipper. Consignee or Owner of the goods or to any Holder of this resulting Lading for any loss, damage or delay of whatsoever kind arising or acting directly or indirectly from any act, neglect or default on his part while prejudice in the course of or in connection with his employment and, but without exemption, to the generality of the foregoing provisions in this Clause, every exemption limitation, condition and liberty herein contained and every right, to the from liability, defence and immunity of whatsoever nature applicable available and Carrier or to which the Carrier is entitled hereunder shall also be acting as shall extend to protect every such servant or agent of the Carrier Clause the aforesaid and for the purpose of all the foregoing provisions of this of and Carrier is or shall be deemed to be acting as agent or trustee on behalf agents from for the benefit of all persons who are or might be his servants or all such time to time (including independent contractors as aforesaid) and contract in or persons shall to this extent be or be deemed to be parties to the evidenced by this Bill of Lading.

LOADING AT PORT OF

S.S.

OPERATED FOR ACCOUNT OF

PORT OF DISCHARGE FROM VESSEL

SHIPPER

CONSIGNEE—ORDER OF

NOTICE TO BE ADDRESSED TO
of the arrival of the vessel, but no responsibility shall attach to the vessel or carrier if there should be any failure to make such notification.

SHIPPER'S DESCRIPTION OF GOODS

MARKS & NOS.	NO. of PKGS.	DESCRIPTION OF GOODS	GROSS WEIGHT	CUBIC MEAS.	RATE	FREIGHT

J 595a

Defendant's Exhibit E

(ITO's Copy—Dock Receipt)

[Photostats]

(Opposite) ☛

D. Ex. E- IN EVD. 3-19-76

DOCK RECEIPT

SHIPPER/EXPORTER

SHARON CONTINENTAL
P.O. BOX 331
ROCHESTER, NEW YORK

DOCUMENT NO. 707

EXPORT REFERENCES

CONSIGNEE

FORWARDING AGENT - REFERENCES

COPELAND SHIPPING INC., 11321-02

POINT AND COUNTRY OF ORIGIN

NOTIFY PARTY

DOMESTIC ROUTING/EXPORT INSTRUCTIONS

CITY TRUCKER/ [illegible]

PIER OR AIRPORT

[illegible] ARMY BASE

EXPORTING CARRIER (Vessel/Airline) SS. AFR. [illegible] 3/15

PORT OF LOADING NEW YORK

AIR/SEA PORT OF DISCHARGE DURBAN

FOR TRANSSHIPMENT TO

ONWARD INLAND ROUTING

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
[illegible] & COMPANY P.O. BOX [illegible] [illegible] GARDINER ST DURBAN SOUTH AFRICA [illegible]	11 1	TM. CTNS./OPTICAL MACHINERY & CRATE / ACCESSORIES.	[illegible]	381

BEST COPY AVAILABLE

REC'D OCT 8 1975 INSURANCE DEPT.

DELIVERED BY:

LIGHTER
TRUCK

ARRIVED- DATE .... TIME ....

UNLOADED-DATE .... TIME ....

CHECKED BY........

PLACED IN SHIP / ON DOCK LOCATION ....

RECEIVED THE ABOVE DESCRIBED GOODS OR PACKAGES SUBJECT TO ALL THE TERMS OF THE UNDERSIGNED'S REGULAR FORM OF DOCK RECEIPT AND BILL OF LADING WHICH SHALL CONSTITUTE THE CONTRACT UNDER WHICH THE GOODS ARE RECEIVED, COPIES OF WHICH ARE AVAILABLE FROM THE CARRIER ON REQUEST AND MAY BE INSPECTED AT ANY OF ITS OFFICES.

✓

FOR THE MASTER

BY ....
RECEIVING CLERK

DATE ....

502
WHSE NO. 0846

ONLY CLEAN DOCK RECEIPT ACCEPTED. D-Ex E-1

Lighter } Coty
Car } No. 9894 JH
Truck }

I.T.O.

Started Date

Finished Date

Location

1974 MAR 13 AM 8:03

SHIPPERS ARE REQUIRED TO FILL OUT AS BELOW

MARKS	NO. of Pkge.	MEASUREMENTS						Total Cubic Ft.		Weight Gross
		Length		Breadth		Depth				
		Ft.	In.	Ft.	In.	Ft.	In.	Ft.	In.	
94/96										
Totals										

||||| ||||| = 11 [illegible]

| = 1 [illegible]

12

Rec 12

3/13/74

D. Ed F-2 xxx

J 597a

Defendant's Exhibit F

(Morgenster—Partial Dock Receipts)

[Photostat]

(Opposite)

Morgenster A/R for - EL - Portraits

1- Gerhard + Hey - 14 Cs loaded - 1350# - 70'
4- Competent - 8 bxs loaded - 1600 - 78
13- K. Ellis - 20 skids " - 10420 - 828
80- Snedekers - 5 drs. " - 2396 - 68
(92) IGE - 3 skids " - 4000 - 135
99- Seaboard - 2 Cs " - 1148 - 72

DEX F. IN EVID
3-19-76 S.T.

J 599a

Defendant's Exhibit G

(Morgenster—Dock Receipts to be Loaded Nederburg)

[PHOTOSTATS]

(Opposite) ☛